

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



76-2147  
FILED COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DOCKET NO. 76-2147

VINCENT PACELLI,

Petitioner-appellant

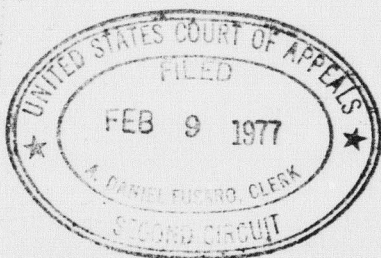
v.

UNITED STATES OF AMERICA,

Respondent-appellant

On appeal from the United States District  
Court for the Southern District of New York

BRIEF AND APPENDIX FOR PETITIONER-APPELLANT



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOCKET NO. 76-2147

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VINCENT PACELLI,  
Petitioner-Appellant,  
v.  
UNITED STATES OF AMERICA,  
Respondent-Appellee

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On Appeal from the United States District  
Court for the Southern District of New York

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BRIEF FOR PETITIONER-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether petitioner-appellant was denied Due Process and his conviction was void because of knowing suppression of evidence and knowing use of perjury by the prosecution.
2. Whether the District Court erred in failing to hold a hearing on petitioner's motion.

STATEMENT OF THE CASE

Petitioner-appellant (hereinafter "appellant") was convicted after a jury trial before Judge Bonsal, on June 22, 1965, of conspiring to import narcotics into the United States. He was sentenced to eighteen years in prison and fined \$20,000. His conviction was affirmed on appeal, United States v. Armone, 363 F.2d 385 (2d Cir. 1966), and certiorari was denied, 385 U.S. 957 (1966). He has been serving his sentence since May 19, 1965 (A. 3).\*

The Government's case against petitioner was based upon the testimony of one Charles Hedges, previously convicted of importing narcotics, see United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963), who claimed he made deliveries to and received payments from appellant, among others (A. 4).

On July 24, 1975, appellant filed a motion to vacate his conviction and sentence, pursuant to 28 U.S.C. §2255. Relying largely upon the testimony of Hedges and others in trials subsequent to his, appellant claimed that the Government had suppressed evidence and knowingly relied upon perjury in obtaining his conviction. On September 8, 1976, Judge Bonsal denied the petition without a hearing (A. 70). This appeal is from that denial.

STATEMENT OF FACTS

Prior to appellant's trial, Charles Hedges was tried in the District of Connecticut for conspiracy to import heroin. The Government's evidence in that case tended to show that Hedges had received shipments of narcotics from couriers in New York and that he had delivered them to one Joe Cahill. Hedges took the stand in his own defense and denied that he knew Cahill or the Government witness, one Aspelund, an alleged courier.

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\*Reference is to appellant's appendix.

Hedges swore that the first time he saw heroin was in the courtroom (A. 4). Hedges was disbelieved, the jury convicted him, and the court sentenced him to fifteen years. On March 21, 1963, Hedges' conviction was affirmed on appeal. United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963).

At appellant's trial, on May 4, 1965, Hedges completely changed his testimony, swearing that he had helped import narcotics for Cahill, Aspelund, and others, including appellant. His prior testimony, he said, was perjury (A. 4).

Appellant's §2255 motion, relying heavily on transcripts of trials, subsequent to his, alleged a pattern of perjury and nondisclosure. The allegations, the Government's response, and the court's findings were as follows:

1. Tape recordings and Hedges' affidavit

At appellant's trial, his counsel made the usual requests under 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1963). As subsequently appeared, in United States v. Kahn et al, S.D.N.Y., 65 CR 999, federal agent Dugan and another agent had installed a recording device on Hedges, in October, 1964, and at least four conversations between Hedges and his putative attorney, Frances Kahn, were recorded. The recorded conversations related to Kahn's efforts to change Hedges' testimony, or induce him not to cooperate. Appellant was prominently mentioned by Kahn, and bribes were allegedly offered on appellant's behalf. The testimony discussed in those conversations was the testimony which Hedges subsequently gave against appellant (A. 4, 5).

In his §2255 petition, appellant alleged that none of the aforementioned recordings were disclosed to him during his trial (A. 4). Appellant also complained that an affidavit executed by Hedges on September 20,

1963, wherein Hedges swore that Kahn had offered him a bribe on appellant's behalf (A. 28) had not been disclosed (A. 5, par. 12). In support of his motion, appellant submitted an affidavit swearing that at no time prior to or during his trial was he aware that any tapes were made of conversations between Hedges and Kahn (A. 32).

In response, the Government quoted a portion of the transcript, heretofore impounded by the court, and which appellant had never seen (A. 17-20). It now appears that the material was disclosed to counsel at trial under a strict admonition from the court not to "communicate any of the contents of this material to your clients" (A. 18). Subsequently, counsel objected to the admonition (TR. 1147-1149). The judge then directed counsel to tell their clients that "the judge made available to you certain material dealing with Miss Kahn and that you looked at it and you felt there was nothing in this material that was important or useful to [the] defense . . ." (TR. 1151).

Appellant responded below to these disclosures by contending that it was a deprivation of Due Process and the right to counsel to have entered such an order (A. 36-37).

In denying this portion of appellant's motion, the court merely said that there had been disclosures to counsel and none of them chose to use the material "as it would have obviously been seriously damaging to their client's interest" (A. 72).

As to Hedges affidavit, appellant pointed out that the court had excised everything in the affidavit relating to him. The portions disclosed "did not give the slightest inkling that any conversations between Kahn and Hedges related to the petitioner, or even to the case" (A. 35). The court did not discuss the affidavit in its opinion.

2. Dugan's and Hedges' perjury relating to recordings and visits

Narcotics agent Dugan, who prepared the prosecution, testified in appellant's trial that no recordings of Hedges were made; that he, Dugan, was the only agent who interviewed Hedges (A. 4, par. 7). Appellant alleged, however, relying upon the testimony in United States v. Kahn, 65 CR 999, that in truth Dugan had recorded at least four statements by Hedges and that he had been assisted in that endeavor by another federal agent (A. 5).

Appellant claimed that the Government had knowingly relied upon Dugan's perjury (A. 5).

The Government's position was that Dugan's testimony was not perjurious, that Dugan's denial related to statements "containing admissions or facts of the violations in the case then on trial" (A. 16). The court found, without discussion, that appellant's claims "are either contradicted or not supported by the record" (A. 72).

A related bit of perjury by Hedges was his testimony that the reasons for agent Dugan's frequent visits to Hedges was that Dugan brought Hedges' wife to see him (A. 5, par. 10). In truth and in fact, Dugan was supervising Hedges' conversations with Kahn. This issue was not mentioned by the court.

3. Hedges' role as informer

Appellant alleged, again in reliance upon United States v. Kahn et al, that from September, 1963 through 1964, Hedges was actively engaged as a Government informer and provocateur, deceiving his attorney and helping to build a case against her and appellant. "No part of this relationship, none of this deception, and none of this activity on the Government's behalf was known by or disclosed to the petitioner during his

trial . . ." (A. 6, par. 13). The Government ignored this issue, as did the court.

4. Relationship between Dugan and Hedges

Agent Dugan testified in United States v. Guante et al, 64 CR 828, in March, 1969, that in 1962, Hedges lived in an apartment provided him by Dugan, who got him out on bail pending appeal. Dugan frequently visited Hedges there. None of these facts was known to or disclosed to appellant during his trial (A. 6, par. 14). The Government impliedly admitted these allegations but said the nondisclosure was "cumulative" (A. 21). The court did not discuss the issue.

5. Hedges' perjury concerning his sentence reduction

Hedges' fifteen year sentence in United States v. Cianchetti, was reduced by Judge Timbers on May 15, 1963, less than sixty days after his conviction had been affirmed. Hedges swore at appellant's trial that he had no conversation with anyone in the Government about a sentence reduction (TR. 1070); it was just dropped in his lap: "I was offered nothing, promised nothing, and I asked nothing" (TR. 1070). Hedges even denied knowing that the Government had not opposed his sentence reduction. He swore that he, on his own, told his attorney to apply for a reduction (TR. 1047).

Appellant's motion alleged that this testimony was perjurious and known to be such by agent Dugan, who was present when the testimony was given (A. 7).

Appellant alleged that Hedges, who began cooperating in May, 1962, while his appeal was pending, demanded a sentence cut from Dugan as a precondition to Hedges testifying. Dugan went to Judge Timbers, who agreed, and told Dugan to instruct Hedges to have his attorney file the motion.

Dugan did as he was told, as did Hedges (A. 8). The foregoing allegations were supported by the previously suppressed evidence of the close relationship between Dugan and Hedges, e.g. the fact that Hedges was living in Dugan's apartment, Dugan helped Hedges get out on bail, Dugan visited Hedges frequently, Dugan made an informer-provocateur out of Hedges, all during the period when Hedges got his sentence reduction. Appellant's claims were further supported by a communication from Judge Timbers to Judge McLean, set forth at p. 1410 of United States v. Kahn. There, Judge Timbers is said to have stated that he met with Dugan and Dugan told him that the Government would not oppose a sentence reduction for Hedges. Judge Timbers then advised Dugan to tell Hedges or his attorney to file a motion for sentence reduction (A. 8).

The Government, curiously, relied upon the statement of Judge Timbers as refutation of appellant's allegations (A. 22-24). The court was also apparently of the view that Judge Timbers statement was a refutation, simply stating that Judge Timbers "initiated" the reduction (A. 72).

6. Dugan's perjury concerning Hedges' sentence reduction

Narcotics agent Dugan not only let Hedges' testimony concerning the sentence reduction go uncorrected, he testified that he did not advise Hedges to seek the sentence reduction. This, appellant alleged, was perjurious, for the reasons set forth above (A. 7). This issue was not discussed by the court below.

7. Hedges' perjury concerning Government assistance

Hedges swore at appellant's trial that he was "offered nothing, promised nothing . . . asked for nothing" (TR. 1070) and "expected to get nothing" (TR. 972) for his cooperation. Appellant alleged that this testimony was wilfully false, relying on the previously undisclosed

Government involvement in the sentence reduction, Dugan's close relationship with Hedges; his help in housing, bail and other matters. Appellant further supported his allegations with the testimony of James Godwin, Hedges' cousin, who was also a Government witness in appellant's trial. In United States v. Guante, 64 CR 828, a 1969 trial, Godwin swore that when he and Hedges were in jail prior to appellant's trial, Hedges said that Government agents "told him they would . . . get his sentence reduced from fifteen years to five years" (TR. 918), that "they would get him out, they would give him money, they would give him a car, they would give him anything if he would testify in the case" (TR. 920). Godwin's testimony, in turn, was corroborated by the fact that Hedges did get Government help in bail, the sentence reduction, and housing. Hedges also received \$3,000 in cash from the Government (TR. 918).

On this issue the Government contented itself with the claim that the evidence was merely impeaching and would not have effected the outcome of the trial (A. 25). The Government also claimed that Hedges had testified "as to his expectation of future assistance from the Government, both when he began cooperating and at the time of trial" (A. 56). Challenged to produce record support for this claim (A. 68, 80), however, the Government was unable to do so (A. 45-46). The matter was not discussed by the court.

8. Hedges' belated implication of appellant

Appellant also alleged in his motion that although Hedges began cooperating with the Government in May, 1962, he did not implicate appellant until December, 1962 (A. 9). The seven month delay in Hedges' implication of appellant was not disclosed to the defense. It was not known until Hedges so testified in United States v. Kahn, in 1966 (A. 9). Not disputing

the facts, the Government claimed that they were irrelevant (A. 26).

The court ignored the issue.

9. Hedges' perjury covering up a robbery

In appellant's trial, Hedges swore that \$1500 found on him when he was arrested was won in a crap game. In United States v. Kahn, however, he admitted that the money came from a robbery, for which he could still be prosecuted (A. 10). Thus, Hedges not only committed perjury, in doing so, he covered up a serious criminal offense, one for which he could be prosecuted without Government help. The perjury therefore deprived the defense of material evidence of bias on Hedges' part.

The Government's response to this issue is unintelligible (A. 26). There was none by the court.

10. Hedges' involvement in a killing

In United States v. Kahn, Hedges testified that there were gun charges pending against him, arising out of a gun fight prior to his arrest in which his adversary was killed. Appellant alleged that since these charges were pending during his trial, they should have been disclosed to the defense and were not (A. 10). The Government called this allegation "unsupported and frivolous" (A. 26). The court ignored it.

ARGUMENT

I

Appellant's constitutional rights were violated and his conviction is void

A. The Hedges' affidavit and the Hedges-Kahn tapes

The conversations between Hedges and Kahn prior to appellant's trial were not disclosed to appellant. They were plainly relevant and material to his defense, since Kahn was allegedly acting as appellant's agent, and Hedges was engaged in an elaborate scheme of deception, which would surely have a bearing on his credibility at appellant's trial. These materials were admittedly producible under 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1963) (See A. 36). The court below apparently recognized this but treated disclosure to defense counsel as if it were disclosure to the defense (A. 72). This is not the law. What the court did here — order counsel not to disclose the information to the defendants — was analogous to what happened in Geders v. United States, 425 U.S. 80 (1976). There, counsel was ordered not to discuss the case with the defendant while he was under cross-examination. The Court unanimously reversed, holding that the defendant's right to counsel includes a right to discuss with counsel every step of the trial as it occurs. Mr. Justice Marshall, joined by Mr. Justice Brennan, noted in concurrence that

"the general principles adopted by the Court today are fully applicable to the analysis of any order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial." Id. at 92 (emph. in orig.).

This case is not essentially different. Unless appellant were apprised of the affidavit and tapes, his counsel could not confer with him concerning vital steps in the defense and his right to counsel on that phase of the

case became an empty formality. Cf. Herring v. New York, 422 U.S. 853 (1975); Maness v. Meyers, 419 U.S. 449 (1975).

Had he been apprised of these matters, the defendant might have decided not to pursue them on cross-examination. On the other hand, they did reveal Hedges to be a conniving schemer; quite a different person than he portrayed himself to the jury. Had the defendant been permitted to confer with counsel on the matter, the tapes might have been effectively employed. No one can know. But neither could one know whether the order in Geders had any effect on the trial. In a matter as basic as this, the notion of harmless error is inappropriate.

B. Dugan and Hedges' perjury

Appellant alleged, and produced substantial evidence to support the allegations, that agent Dugan perjured himself when he denied that any recordings of Hedges were made, when he said he was the only agent who interviewed Hedges (item 2, supra), and when he testified that he had not advised Hedges to seek a sentence reduction (item 6, supra). Hedges lied, moreover, when he said that Dugan visited him to bring his wife, when in fact he was supervising Hedges' dealings with Kahn (item 2), when he denied any conversation with anyone in the Government concerning a sentence reduction (item 5), and when he swore he was promised nothing and expected to get nothing for his testimony (item 7). Finally, Hedges committed perjury when he swore that money found on him was from a crap game when in fact it was from a robbery (item 9).

It has long been the law that knowing use of perjury by the Government denies Due Process and voids the conviction. Napue v. Illinois, 360 U.S. 264 (1959). It is no answer to suppose that the jury might have convicted anyway, without the perjury, nor that the perjury only related

to credibility. The knowing reliance on perjury relating merely to a witness' credibility itself voids a conviction, whether or not it is "cumulative" or "collateral." Napue v. Illinois, supra; Giglio v. United States, 405 U.S. 150 (1974); United States v. Morrell, 524 F.2d 550, 554 (2d Cir. 1975). Nor is United States v. Agurs, 96 S.Ct. 2392 (June 24, 1976), upon which the court below relied, otherwise. That case involved the failure of the prosecutor to volunteer that his witness had a criminal record. The Court carefully distinguished that case from one like the present:

" . . . the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury." 96 S.Ct. at 2397.

Dugan's perjury was Government perjury, and Dugan, who was present at Hedges' perjury, plainly knew it to be such. There can be no doubt, therefore, that the Government's reliance was "knowing." Furthermore, if there were any room for dispute on the issue of Government knowledge, it should be determined after an evidentiary hearing. United States v. Hilton, 521 F.2d 164 (2d Cir. 1975).

C. Suppression of facts concerning Government assistance

Even if there had been no perjury by Dugan and Hedges, the Government would have wilfully violated Brady v. Maryland, 373 U.S. 83 (1963), in failing to disclose Hedges' role as an informer-provocateur (item 3 supra), the close relationship between Dugan and Hedges when the case was being "developed," including the fact that Dugan provided housing for Hedges (item 4, supra), Dugan's assistance in getting a sentence reduction (item 5), and Government money promised and paid to Hedges (item 7).

These facts were impliedly and, in many cases perjurally,

covered up by the Government. With respect to the sentence reduction, for example, not only did Hedges deny any conversations concerning it and claim he did it on his own (A. 7), Dugan also denied that any such conversations occurred (A. 7, par. 20). And when the defense asked for a stipulation that the Government had not opposed a sentence reduction, the Government, with Dugan present in the courtroom, refused (A. 7, par. 18). Furthermore, when the defense demanded disclosure by the Government whether any communications occurred between the Government and Judge Timbers concerning Hedges' sentence reduction, nothing was forthcoming (A. 7, par. 19). This entire pattern of perjury and nondisclosure had the purpose and effect of foisting upon the jury a witness who ostensibly had, as he said, been "offered nothing, promised nothing . . . asked nothing" (TR. 1070), "expected nothing" (TR. 972) and, by clear implication, got nothing for his testimony.

In truth and in fact, as the report from Judge Timbers proves, Dugan and Judge Timbers did discuss the sentence reduction and Dugan said the Government would not oppose (A. 8). There would have been no such reduction had Dugan opposed it. Moreover, Dugan was instructed by Judge Timbers to tell Hedges or his attorney to file the motion. The inference is inescapable that Dugan discussed the matter with Hedges, whom he was regularly visiting, and took full credit for the deed.\*\*

Judge Timbers' account is amply corroborated by the testimony of Hedges' cousin, James Godwin, who swore in United States v. Guante that

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\*\*It is possible, of course, that Dugan merely spoke to Miss Kahn, Hedges' putative attorney. This is very unlikely, however, in view of Dugan and Hedges' close relationship; the fact that Dugan and Hedges were in the process of making a case against Kahn. It also conflicts with Hedges' testimony, wherein he claimed the idea originated with himself (TR. 1074) (A. 7, par. 17).

Government agents "told him they would get his sentence reduced from fifteen years to five years" (A. 8-9). Moreover, as also appears in Guante, Hedges also received \$3000 from the Government (A. 9, par. 25).

Even if there had been no perjury on these issues, and no specific Brady requests, Hedges' testimony itself would have sharpened the issue and imposed upon the Government a clear obligation to disclose what was promised to Hedges and what was done for him. See United States v. Miller, 411 F.2d 825 (2d Cir. 1968), Giglio v. United States, 405 U.S. 150 (1974). The prosecution's suppression was clearly "deliberate" in that its high value to the defense could not have escaped the prosecution's attention. See United States v. Keogh, 391 F.2d 138 (2d Cir. 1963).

D. Hedges' belated implication of appellant (item 8)

Both Dugan and Hedges testified at appellant's trial that Hedges began cooperating with Dugan in July, 1962 (TR. 384, 3326). There is other evidence that the cooperation began in May (A. 9). In any event, as appears in United States v. Kahn, Hedges did not implicate appellant until December, six or seven months later (A. 9). The belated implication of appellant was not disclosed in his trial. Dugan and Hedges' testimony about cooperation in July was therefore grossly misleading to the jury, if not perjurious, and created an obligation of disclosure. Hedges July "cooperation" was either partial or pretended cooperation -- when he didn't mention appellant -- or his later insertion of appellant, in December, was perjurious. Appellant was entitled to have the jury decide which it was. By failing to disclose, the Government deprived the defense of key evidence impeaching Hedges' credibility, and knowingly permitted the jury to be deceived by false testimony.

E. Hedges' perjury about a robbery and his involvement in a killing

The Government permitted Hedges to testify in appellant's trial that money found on him came from a crap game whereas in fact, as appears in United States v. Kahn, it came from a robbery for which Hedges could still be prosecuted (item 9). If the Government knew about the robbery, which is likely, this perjury alone would require a new trial.

Nor did the Government disclose to the defense that gun charges were pending against Hedges when he testified, arising out of a gun fight in which Hedges' adversary was killed. These facts were disclosed in United States v. Kahn, much later (item 10).

Hedges very much needed Government help to avoid state prosecution on this charge. This evidence was therefore highly material to the defense. It is inconceivable, moreover, that the Government was unaware of the gun charges, since, as appears in Kahn, Dugan visited Hedges in the hospital while Hedges recovered from his own wounds.

Appellant did not conclusively prove Government knowledge of these facts, but he did allege same and had good ground for doing so. The extent of Government complicity is for an evidentiary hearing. United States v. Hilton, 521 F.2d 164 (2d Cir. 1975); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

II

It was patent error for the District Court to deny the petition without a hearing.

As noted in Brown v. United States, 426 F.2d 681 (5th Cir. 1972),

"[T]he command of Title 28, U.S.C. Section 2255 is plain and unequivocal: 'Unless the motion and the files and records of the case conclusively show that petitioner is entitled to no relief, the court shall . . . grant a prompt hearing thereon.'"

Thus, unless all the allegations are vague, conclusory, or palpably incredible, there must be a hearing. Machibroda v. United States, 368 U.S. 487 (1962). None of appellant's allegations fell into those categories. His allegations about Hedges' and Dugan's perjury were each and every one backed up by testimony in other trials. All that could conceivably be claimed by the Government was that the false testimony fell short of perjury or that the Government was unaware of the perjury. But Dugan's testimony was Government testimony and his knowledge of Hedges' testimony was knowledge of the Government. United States v. Morrell, 524 F.2d 550, 555 (2d Cir. 1975).

A §2255 motion cannot be disposed of on the basis of countering affidavits, which are no part of the record of the case. Brown v. United States, supra; Montgomery v. United States, 469 F.2d 148 (5th Cir. 1971). Moreover, the affidavits in opposition were nothing more than argument. They contained virtually no allegations of fact, apart from the claim of the Assistant United States Attorney who executed them that he had no knowledge of suppressed evidence (A. 11, 44). The Government did not even see fit to consult Dugan, Hedges, Judge Timbers, or the prosecutor in the case, Mr. Jacobs, the only persons who could provide relevant information concerning Government complicity in the suppression (A. 30).

The only legitimate basis upon which an evidentiary hearing could be denied is that the record conclusively established that appellant could not possibly prove his allegations. Fontaine v. United States, 411 U.S. 213 (1973). Manifestly, if a petitioner under §2255 were required, in the teeth of the statute, to conclusively prove his claims in the petition itself, there would never be any hearings or relief under §2255. But appellant all but did that. Virtually none of his factual allegations

were even denied, or could be denied, by the Government. All that remained at issue was the extent of Governmental complicity, which could only be determined by the testimony of those involved. See United States v. Morrell, supra. The record as it stands not only fails to contradict appellant's allegations, it supports them.

In his opinion below, Judge Bonsal ignored half of appellant's factual allegations (A. 70). Of those that were discussed, the opinion reveals gross misunderstanding of both the facts and the law. In stating, for example, that "petitioner's allegations are either contradicted by the record or not supported by the record" (A. 72), Judge Bonsal fell into grave error. The primary purpose of §2255 is to permit inquiry into matters de hors the trial record. It robs that section of all meaning to require that allegations be "supported by the record."

In opining that the sentence reduction was "initiated by Judge Timbers" (A. 72), Judge Bonsal missed the point. The point was two-fold: (1) both Dugan and Hedges lied about the matter, and (2) both Dugan and Hedges knew that the Government had played a part in obtaining the reduction, as Judge Timbers' account established.

Judge Bonsal also applied a clearly inappropriate standard from United States v. Agurs, 96 S.Ct. 2392 (1976). That case held that where the prosecutor fails to volunteer impeachment evidence, which was not requested by the defense, a new trial is required only if the evidence gave rise to a reasonable doubt. Such might conceivably be the appropriate standard for evaluating the failure to disclose the pending gun charges against Hedges (item 10, supra), but it was plainly inappropriate for the bulk of appellant's allegations, which involved willful suppression and perjury. See United States v. Morrell, supra, 524 F.2d at 554. A remand

is plainly required, with directions to hold a hearing to determine the extent of Government complicity in the suppression and the perjury and to grant appropriate relief dependent thereon. United States v. Hilton, 521 F.2d 164 (2d Cir. 1975).

CONCLUSION

The judgment of the court below must be reversed.

Respectfully submitted,

Vincent Pacelli, Pro Se

APPELLANT'S APPENDIX

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CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Jury demand date:

JUDGE BONSAI

75 CIV 3624

C. P. No. 124 B. & W.

TITLE OF CASE

ATTORNEYS

08-1 75-3624 07-24-75 2 510 1

For plaintiff:

0839

RG

PACELLI, VINCENT

Vincent Pacelli  
U.S. Penitentiary  
Atlanta, Georgia

-VS-

UNITED STATES OF AMERICA

For defendant:

BEST COPY AVAILABLE

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DIS.
S. E mailed	Clerk	JUL 24 1975	55272		
S. C mailed	Marshal				
Cost of Action: Motion to ate sentence 200302255	Docket fee				
	Witness fees				
Non prose at:	Depositions				

75 CV 302

## PROCEEDINGS

Date Order  
Judgment No

- (1) Filed petition and motion to vacate sentence.
- 3-14-76 (2) Filed Government's affidavit in opposition to Petitioner's motion.
- 3-14-76 (3) Filed Government's affidavit in opposition to petitioner's motion.
- 3-14-76 (4) Filed Petitioner's notice of motion for enlargement of bail.
- 3-14-76 (5) Filed Petitioner's memorandum in support of his motion for enlargement of bail.
- 3-14-76 (6) Filed Petitioner's affidavit in support of motion for bail.
- 3-14-76 (7) Filed " Petition for Habeas Corpus re: before Bonsal, J.
- 3-14-76 (8) Filed " affidavit in support of motion to vacate.
- 3-14-76 (9) Filed " Memorandum in reply to Government's affidavit in opposition.
- 3-29-76 (10) Filed Government's affidavit in response to petitioner's reply.
- 3-29-76 (11) Filed " memorandum of law in rejoinder to petitioner's memorandum in reply.
- 8-12-76 (12) Filed petitioner's reply to Government's memorandum of law.
- 9-08-76 (13) Filed Memorandum #45054: Petitioner moves for an order vacating his conviction & sentence. Since petitioner's motion is without merit & is void of support in the trial record or in the affidavits submitted to the court, the motion is denied without a hearing. So ordered. Bonsal, J. m/n
- 9-22-76 Filed Petitioners' Petition for Relief from Final Judgement and Order.
- 9-13-76 Filed Petitioners' Petition for Declaratory Relief and Summary Judgement.
- 10-18-76 Filed affidavit in response by deft re: reply to petitioners reply to gov'ts memo of law etc.
- 10-27-76 Filed motion by plttf re delivery of transcripts by the deft to plttf. Received in Chambers 09-28-76.
- 11-1-76 Filed petitioner's notice of appeal from denial of motion to vacate sentence, dated September 8-76 n/n to petitioner at Box Pmb 89010, Atlanta, Ga. and xxx U.S. Attorney for the Southern District of New York.
- 1-03-76 Filed order that petitioners motion for the delivery of transcripts is granted (pages 369, 369a, 920-929 & 1147-1153). Costs of reproduction will be assessed against petitioner Bonsal J. m/n copy to pe
- 1-03-76 Filed order that petitioner's request for declaratory relief and summary judgment are denied in accordance with the Court's Memo. of 09-08-76. Bonsal J. m/n copy to petit.
- 1-03-76 Filed order that petitioners request for relief from final judgment and order is denied in accordance with the Court's memo of 9-8-76. Bonsal J. m/n copy to petit.

A TRUE COPY

RAYMOND E. LUNNEY, CLERK

By *[Signature]**[Signature]*

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

VINCENT PACELLI

vs.

UNITED STATES OF AMERICA

No. \_\_\_\_\_

MOTION TO VACATE SENTENCE  
PURSUANT TO 28 U.S.C. § 2255

Petitioner, Vincent Pacelli, roves the court to vacate his conviction and sentence in 64 CR. 828, pursuant to 28 U.S.C. § 2255, on the ground said conviction and sentence were imposed in violation of the Constitution of the United States. In support thereof petitioner alleges:

1. On September 30, 1964, petitioner was indicted in the Southern District of New York, in 64 CR. 828 which alleged one count of conspiracy with twenty-seven other persons, from March, 1956, to import and distribute narcotics.
2. On June 22, 1965, petitioner was convicted in a jury trial before Judge Bonsal.
3. On July 29, 1965, petitioner was sentenced to eighteen years in prison and fined \$20,000.
4. Since May 19, 1965, petitioner has been imprisoned. He is presently incarcerated in the Federal Penitentiary, Atlanta, Georgia, serving the aforesaid sentence.

5. The only Government witness directly implicating petitioner, Charles Hedges, had earlier been tried and convicted in the District of Connecticut for importing narcotics from September, 1958 to July, 1959. The Government's evidence in that case, as in petitioner's, tended to establish that Hedges received shipments of heroin from couriers in New York and delivered them to one Joe Cahill. Hedges took the stand, on March 17, 1961 and denied that he knew Cahill or the Government witness, Aspelund, an alleged courier. Hedges swore the first time he ever saw heroin was in the courtroom (Tr. 2013, CR. No. 10, 250, Dist. Conn.). Hedges received a fifteen year prison sentence, and his conviction was affirmed on March 21, 1963. United States v. Cianchetti, 315 F. 2d 584 (2d Cir.).

6. At petitioner's subsequent trial, on May 4, 1965, Hedges completely changed his testimony, swearing that he had helped import narcotics for Aspelund, Cahill and others (Tr. 125-348), and claiming he made deliveries to and received payments from petitioner among others (Tr. 264-265). His prior testimony, he said was lies (Tr. 350, 654).

#### KNOWING USE OF PERJURED TESTIMONY AND SUPPRESSION OF EVIDENCE

##### A. Recordings

7. In petitioner's trial, counsel requested all §3500 materials, and some were turned over (Tr. 355). However, no tape recordings were disclosed to the defense. Moreover, F.B.N. agent Thomas Dugan, who was in charge of preparing the prosecution, testified under oath in petitioner's trial that no tape recordings of Hedges were made and that he, Dugan, was the only agent who interviewed Hedges, (Tr. 413).

8. In truth and in fact, as appears in later testimony in February, 1966, in United States v. Kahn et al., S.D.N.Y., 65 CR 999, agent Dugan and another agent installed a recording device on Hedges in October, 1964, and recorded, during October, at least four conversations between Hedges and his attorney Miss Kahn, who was allegedly acting as an agent for petitioner in efforts to bribe Hedges. In those conversations, there are numerous references by both Hedges and Kahn to the petitioner and relating to the charges in 64 CR. 828.

9. The Government was under a clear duty, per 18 U.S.C. §3500 and Brady v. Maryland, to disclose the aforesaid conversations to petitioner in his trial some nine months later. The Government even admitted, in the trial of United States v. Guante, S.D.N.Y. 64 CR. 828, in 1969 that said recordings were producible §3500 in petitioner's case (See Tr. 121).

10. The Government knowingly relied on Hedges' false testimony in petitioner's trial, wherein Hedges stated that the reasons for Dugan's frequent visits to Hedges was that Dugan brought Hedge's wife to see him (TR. 764).

11. The Government also knowingly relied on agent Dugan's perjured testimony in petitioner's trial, denying that any such recordings were made, and thus violated Mapp v. Illinois 360 U.S. 264 (1959), and United States v. Miller, 411 F. 2d 825 (2d Cir. 1968).

B. Hedges' affidavit of September 20, 1963

12. As appears from Hedges' testimony in United States v. Kahn, supra, Hedges executed an affidavit on September 20, 1963, swearing that Miss Kahn had told him that petitioner offered him money and protection if he would not testify. This affidavit was not disclosed in petitioner's trial, in June, 1964. It, like the recordings, was plainly producible: (1) as §3500

statement of the witness Hedges; (2) as a statement of petitioner through an alleged agent; (3) as evidence of the witness' relationship to the Government; (4) as evidence of the witness' lies and deceptions in connection with the case.

C. Hedges' role as informer-

13. As further appears from Hedges' testimony in United States v. Kahn, supra, Hedges, from about September, 1963 until through 1964 was acting as a secret government informer, while pretending to be otherwise. During that period, as he testified in Kahn, he not only permitted the Government to record statements between himself and his attorney, Miss Kahn, he took direction from the Government concerning his consultations with Miss Kahn, prepared spurious motions, and deceived her in numerous other ways (TR. of motion to suppress, U.S. v. Kahn, pp. 22, 23, 35, 71), all in an effort to get evidence against petitioner. No part of this relationship, none of this deception, and none of this activity on the Government's behalf was known by or disclosed to the petitioner during his trial, and thus deprived petitioner of Due Process.

D. Further assistance to Hedges and close relationship with Dugan

14. As appears from Agent Dugan's testimony in United States v. Guante et al., 64 CR. 828, in March 1969, Charles Hedges lived in an apartment provided for him by agent Dugan who got him out on bail pending appeal, from August, 1962 to December, 1962 (Tr. 980). Dugan frequently visited him there (Tr. 980). This evidence was not disclosed to petitioner prior to or during his trial and was plainly relevant and material as bearing on the witness' relationship with the Government during the previous period when Hedges decided not only to cooperate (which he did in May, 1962) but to implicate petitioner (which he did in December, 1962).

5. 7

15. This suppressed evidence also had a close bearing on the credibility of Hedge's false testimony that he was not promised, did not receive and did not expect anything from the Government (Section F infra).

E. Hedges' sentence reduction

16. Charles Hedges' fifteen year sentence imposed by Judge Timbers was reduced to five years on May 15, 1963 (Tr. 762), less than sixty days after his conviction had been affirmed.

17. Hedges swore at petitioner's trial that he had no conversation with anyone in the Government about a sentence reduction (Tr. 1070); it was just dropped in his lap: "I was offered nothing, promised nothing, and I asked nothing" (Tr. 1070). Hedges even denied knowledge that the Government had not opposed a sentence reduction (Tr. 1072). According to Hedges, he, on his own, told his attorney to file an application for reduction (Tr. 1074).

18. Defense counsel requested a stipulation that the Government had not opposed the reduction of sentence. The Government, with agent Thomas Dugan present in the courtroom, refused (Tr. 1072).

19. Defense counsel, again with Agent Dugan present, demanded disclosure by the Government whether any communications occurred between the Government and Judge Timbers concerning Hedges' sentence reduction (Tr. 1404). Nothing was forthcoming.

20. Narcotics agent Thomas Dugan testified that although he had earlier told Hedges to move for reduction of bail, which Hedges did and which was granted (Tr. 3333), he did not tell him to make the motion to reduce sentence (Tr. 3333-34).

21. Hedges testimony referred to in paragraph 17 was perjurious, as was Dugan's denial of any communication with Hedges concerning the reduction (para. 20). Dugan who was present throughout the trial, knew precisely what had happened:

a. Hedges, who had begun cooperating in May, 1962 while his appeal was pending, demanded of Dugan that he get the sentence cut, before Hedges would testify in a trial as a Government witness.

b. Dugan went to Judge Timbers and requested the sentence reduction. Judge Timbers agreed, and Dugan who was a frequent visitor of Hedges' who lived in an apartment obtained for him by Dugan, told Hedges to have his attorney file the motion.

22. The Government therefore knowingly employed perjurious testimony concerning the help Hedges had obtained from the Government relative to his sentence.

23. The allegations in paragraphs 21 and 22 are supported by previously suppressed evidence of Dugan's close relationship with Hedges well prior to the reduction (See sections A, B, C, D, and F herein), including Hedges' activity as a Government provocateur, and a communication from Judge Timbers set forth at p. 1410 of United States v. Kahn (in 65 CR. 999) wherein Judge Timbers is said to have stated that he met with Dugan who told him the Government would not oppose a sentence reduction for Hedges. Judge Timbers then advised Dugan to tell Hedges or his attorney to file a motion for sentence reduction. The inference is overwhelming that Dugan did in fact tell Hedges to file the motion and took full credit, with Hedges, for its having been granted.

F. Hedges expectations of Government help

24. Hedges' sworn claims at petitioner's trial that he was "offered nothing, promised nothing, ...asked for nothing" (Tr. 1070) and "expected to get nothing" (Tr. 972) were false and known to be false by Narcotics agent Dugan, who was present when such testimony was elicited.

25. In fact, as James Godwin, Hedges' cousin who was also a Government witness in petitioner's trial, testified in 1969, in United States v. Guante, 64 CR. 828, when he and Hedges were in the Westchester County Jail prior to

petitioner's trial, Hedges told him that Government agents "told him they would...get his sentence reduced from fifteen years to five years" (Tr. 918). Godwin further testified that when petitioner's case started, "the agents" told Hedges "that they would get him out, they would give him money, they would give him a car, they would give him anything he wanted if he would testify in the case" (Tr. 920). Hedges did receive \$3,000 (Tr. 918).

26. The falsity of Hedges' testimony is further borne out by the suppressed evidence of Hedges' role as informer-provocateur and his close relationship with agent Dugan. Had such evidence been disclosed to the defense, the perjurious character of Hedges' testimony would have been clear.

G. Hedges delayed implication of petitioner in the offense

28. Both Charles Hedges and Narcotics Agent Thomas Dugan testified at petitioner's trial that Hedges began cooperating with Dugan in July, 1962 (Tr. 384, 3326).

29. As the Government well knew when that testimony was offered, however, Hedges began cooperating at least as early as May 1, 1962. (See Indictment 65 CR. 999).

30. The testimony referred to in paragraph 28 was also knowingly false, moreover, in that it misled the petitioner and the jury into believing that when Hedges began cooperating, he implicated petitioner. In fact, however, as appears in Hedges' testimony in the trial of United States v. Kahn et al., 65 CR. 999; in February, 1966, he did not implicate petitioner until December, 1962, six months later (Tr. 337-8).

31. The falseness of the aforesaid perjury was highly material, as the Government well knew, because the truth would have strongly supported petitioner's claim that Hedges implicated petitioner to get added consideration from the Government rather than to tell the truth.

#### H. Suppression of pending charges

32. In United States v. Kahn, supra, Hedges testified there were gun charges presently pending against him, arising out of an incident which occurred prior to his arrest. These charges were therefore pending during petitioners trial in 64 CR. 828, but were not known by or disclosed to the defense. Their materiality was plain.

33. Hedges testified in petitioner's trial, 64 CR. 828, that \$1500 found on him when he was arrested was won in a crap game. In United States v. Kahn, however, he admitted the money came from a robbery (TR. 480), for which he could still be prosecuted. The Government therefore knowingly relied on false testimony, covering up a serious crime by the witness, which provided additional incentive for him to lie.

#### CONCLUSION

Petitioner was convicted and sentenced to eighteen years on a pattern of perjury induced and suppressed by the Government; crucial impeachment material was willfully suppressed.

But for the aforementioned knowing use of perjury and suppression of evidence, petitioner would not have been convicted.

The judgment and sentence should be vacated forthwith.

Alternatively, a prompt evidentiary hearing should be held during which petitioner can fully establish the facts herein alleged.

Respectfully submitted,

Vincent Pacelli, pro se

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

VINCENT PACELLI, :

Petitioner, :

-v-

: GOVERNMENT'S AFFIDAVIT  
: IN OPPOSITION

UNITED STATES OF AMERICA, :

: 75 Civ. 3624 (DBB)  
: (64 Cr. 828)

Respondent. :

----- X

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

RONALD L. CARNETT, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in  
the office of Robert B. Fiske, Jr., United States Attorney  
for the Southern District of New York, attorney for the  
United States of America, and as such I am familiar with  
this matter, and I make and submit this affidavit in  
opposition to petitioner's motion, pursuant to Title 28  
United States Code, Section 2255, for an order vacating his  
conviction and sentence, or for an evidentiary hearing.

2. Indictment 64 Cr. 828, filed September 30,  
1964, charged petitioner, Vincent Pacelli, and eleven other  
defendants, together with sixteen named co-conspirators in  
a single count with conspiracy to violate the Federal  
Narcotics Laws, Title 21, United States Code, Sections 173  
and 174.

3. On May 3, 1965, and although some defendants

were fugitives, trial commenced before the Honorable Dudley B. Bonsal and a jury.\* On June 22, 1965, petitioner was convicted. On July 29, 1965, Judge Bonsal sentenced petitioner to eighteen years imprisonment and a \$20,000 fine. Petitioner is presently serving this sentence. The judgment of conviction was affirmed on appeal and certiorari was denied. United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, Viscardi v. United States, 385 U.S. 957 (1966).

4. Indictment 65 Cr. 999 was filed on November 8, 1965, charging petitioner and two others, among other things, with conspiracy to obstruct justice and to suborn perjury in violation of Title 18, United States Code, Section 371.

5. In February, 1966, following a declared mistrial, a second trial on the indictment commenced before the Honorable Edward C. McLean and a jury.\*\* Petitioner was already in custody based upon his conviction in the Armone trial. On March 9, 1966, petitioner was convicted on two counts. On March 30, 1966, Judge McLean sentenced petitioner to two years imprisonment on each count to run concurrently, but to run consecutive to the term to which he was sentenced in the Armone trial. This conviction was affirmed by a unanimous panel of the Court of Appeals. United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966).

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\* This trial will hereinafter be referred to as the Armone trial.

\*\* This trial will hereinafter be referred to as the Kahn trial.

6. After the conclusion of the Kahn and Armone trials, several of the fugitive defendants in Armone were apprehended. Their trial commenced before the Honorable Lloyd F. MacMahon and a jury on March 3, 1969,\* and concluded on March 14, 1969, resulting in convictions. The convictions of the defendants were affirmed by a unanimous panel of the Court of Appeals, United States v. Guanti, 421 F.2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970).

7. Charles Hedges was a government witness in each of the above-mentioned trials. He had been convicted for the violation of the federal narcotics laws, Title 21, United States Code, Section 174, after a five-week trial in the United States District Court for the District of Connecticut before Judge Timbers and a jury in March, 1961. During this trial Hedges testified in his own defense and committed perjury. His conviction was affirmed. United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963).

8. While Hedges' appeal from his conviction was pending, Hedges began cooperating with the government in July, 1962. At the Armone, Kahn, and Romano trials, Hedges admitted that he had committed perjury in his own trial in Connecticut. In Armone cross-examination of Hedges lasted five and one-half days. As to his prior perjured testimony the Court of Appeals stated:

The court below [Judge Bonsall] charged that the jury could consider the prior testimony in weighing credibility, and could

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\* This trial will hereinafter be referred to as the Romano trial.

also consider it as affirmative evidence in this trial. An objection ... related to the possibility that both the earlier and current testimony could be false. The trial court thereupon charged:

"Secondly, you remember I talked about Hedges' testimony at the Connecticut trial and I told you it is for you to judge on what occasion he was telling the truth. But, of course, it is equally within your province to find he was testifying falsely on both occasions. You can do that. You can find that or you can determine on which occasion he was telling the truth and in which part of his testimony he was telling the truth." (emphasis added)

These instructions were clear and correct. United States v. Arnone, supra at 402-403.

The issue of Hedges' credibility in his Arnone testimony, in view of his prior perjury, was properly left for the jury's determination. The courts have held that it is the jury which has the right to determine issues of credibility, to weigh the evidence, and to draw reasonable inferences of fact. United States v. Frank, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 988 (1974).

3. Petitioner now claims that Agent Dugan committed perjury in the Arnone trial by denying that tape recordings of Hedges were made. He claims (1) that there were tape recordings of Hedges and his attorney (Laba) as revealed in the Laba trial; (2) that these tapes were required to be produced under Title 18, United States Code, Section 3500 and Brady v. Maryland, 373 U.S. 83 (1963);

(3) that the Government relied on this alleged perjured Dugan testimony in the Armone trial; and (4) that the recorded conversations between Hedges and Kahn were unknown to petitioner during the Armone trial.

10. This claim is wholly without merit. At the outset the Government contends the Hedges-Kahn recordings were irrelevant to the petitioner's trial in Armone. However, the Government, far from suppressing this evidence, was absolutely forthcoming in its disclosures to the petitioner and met its obligations under Brady, the Jencks Act and the Federal Rules of Criminal Procedure, in good faith.

Agent Dugan testified in Armone that no recordings of any statements taken from Hedges were made. In Armone (Tr. 412-14) Dugan on cross-examination testified as follows:

Q Mr. Dugan, talking now, of course, about the witness Hedges, did you at any time make any electrical or mechanical recording of any of his conversations with you or any of his conversations with any other person?

MR. JACOBS: I will object to the form of the question, Your Honor, unless it is limited to somebody connected with the government.

THE COURT: I assume it is. I assume that is the tenor of the question.

Q Let me rephrase it carefully. Maybe it is a little awkward. I think we understand we are talking about recordings, about a tape recording or phonographic recording, a record which reproduces the sound of voices. Mr. Dugan, do you follow that? Are you clear about what kind of a record?

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A A recording of the statement.

Q A sound recording?

A No, I never made a recording of the statement by Hedges.

Q Did you make or cause to be made a recording of any speaking of Hedges connected with the subject matter of this case, whether it was a statement or whether it was a conversation with you or a conversation with somebody else?

MR. JACOBS: Again it should be limited to a government --

MR. KASANOF: I am limiting it to Hedges' speaking about the subject matter of this case, if the government has a record of any sort, written.

THE COURT: Any statement of Hedges' to the government. I will allow that question.

THE WITNESS: I have answered it.

BY MR. LEWIS:

Q Mr. Dugan, were you the only agent to the best of your recollection that interviewed Mr. Hedges?

A To the best of my knowledge, I am the only agent.

It is clear from the record that Dugan was testifying about recorded statements containing admissions or facts of the violations in the case then on trial. Clearly the questions did not relate to the Kahn tapes as will be shown below.

11. That the Government did not notify petitioner of the existence of the tapes between Hedges and his attorney, Kahn, is false. Later in Armone (Tr. 923-23), Judge Bonsal had the following colloquy with defense counsel concerning the tapes:

THE COURT: Now, the other matter which I wanted to talk to you about, you recall the other day that Mr. Jacobs handed up to me Exhibit 67 for identification, a lot of material, a batch of material which Mr. Jacobs didn't feel was 3500 material, but he did the right thing and he handed it up to me to examine.

Now, this material -- and correct me, Mr. Jacobs, if I am not right -- all deals with conversations between Mr. Hedges and a lawyer by the name of Frances Kahn. Included in it are some recordings.

You remember that in the material I gave you Mr. Hedges had indicated to the government that he would permit these conversations to be recorded, conversations in the Lancaster County Jail. I have looked these over. I have not listened to the recordings, but I have looked over this material. I don't find that it has any relevance to the direct testimony, except perhaps in one respect. There were talks about the last time Hedges had a transaction with Calamaria, and apparently the purport of that conversation was an effort on somebody's part, perhaps the lawyer's part, if that could be put back far enough might be a statute of limitations. So that may have a bearing on the direct testimony.

Apart from that, gentlemen, there is a question of credibility and the Court of Appeals, as Mr. Lewis knows, has been rather broad on the subject of allowing such material to be considered as affecting the credibility of the witness. It is true that all of this took place after Mr. Hedges agreed to cooperate with the government.

Further, there is a lot of stuff in here, gentlemen, that I think is dangerous. I think it is dangerous from the defense point of view and it is dangerous from the point of view of seeing that this trial is conducted as I think we all agree it should be. There are references in here to other claims, references to the possibility of crimes being

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committed in connection with this, not by Hedges, and I have thought about this rather carefully and I come back to one of the things that I have always tried to do in these cases and I have always found counsel responded, and that was to let counsel take a look.

However, there will be no copies of this material made. What I would suggest is that during the judicial conference, perhaps tomorrow when we have the executive session, you gentlemen will be free, that you might meet with Mr. Jacobs, perhaps in this room if you want, and I will ask Mr. Jacobs if he would produce a recorder so you should hear these records which I have not heard. I understand the recordings are very poor and that the reason for that is that this lady when she visited Mr. Hedges would bring a transistor radio with her for the purpose of making the recordings difficult. I would like you to go over this, gentlemen. But I make one condition, a very important condition, and I ask each of you to cooperate with me on that, that I don't want any of this material used for impeachment or for any other purpose until after we have met and you have indicated to me very specifically what use you will make of it. I think that is the best that I can do. I ask you, gentlemen, to please not communicate any of the contents of this material to your clients, at least, until you talk to me first, and if after you have a chance to examine her I will be glad to sit down with you again and have you indicate to me what, if any, use you wish to make of this material and what parts you wish to make use of. That is about the best I can do.

What time would you like to arrange that for tomorrow? What time would be convenient?

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MR. KRIEGER: I have an appointment at 10 o'clock which will take about an hour.

THE COURT: Would you want to make it 11 o'clock?

MR. JACOBS: There is quite a bit of material there and while one is reading one, others can read the others. There are about eight or ten different pieces.

THE COURT: Do you have a transcript of the tapes?

MR. JACOBS: Not a transcript, no. First of all, there is very little on the tapes. On one there is an attempted summary by Hedges. We never attempted to transcribe them because the tapes are so garbled. You can sit here for a long time and listen to these tapes and get little out of the tapes themselves.

MR. LEWIS: I was just thinking that in view of that fact I don't know whether you want to listen to the tapes if it is so difficult. If you have some sort of transcript maybe during lunch hour we will stay in and have coffee sent in and read it during lunch hour. Maybe we can save a day tomorrow. There is no use coming in and wasting time.

THE COURT: I think I would rather, Mr. Lewis, that -- I realize it is an imposition but on the other hand I would like a little more chance because I want to sit down with you after. What would be best for you tomorrow, after 11 o'clock? Is that all right?

MR. KRIEGER: I have to be in midtown Manhattan so make it 11:30.

THE COURT: Is that all right?

MR. JACOBS: Right in this room.

THE COURT: Make it 11:30 in this room and then after you have been over it, I am supposed to preside over a panel

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Thursday afternoon if you want to meet with me or before we start on Friday. That is entirely up to you after you read the material.

If you could indicate that you would like such a meeting please do so. After that is done, I want this material again sealed and it will be in a locked file available in the event it is needed (emphasis added).

Dugan testified truthfully, and the recorded conversations between Hedges and Kahn were known to petitioner during the Armone trial.

12. The Government disclosed the existence of the Hedges-Kahn tapes during the Kahn trial as well. Petitioner was a named defendant and was tried and convicted in Kahn. Although the transcript of said trial is unavailable, the Court of Appeals, referring to the record on appeal in Kahn, said:

Appellants' pretrial motions to suppress tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. [emphasis added]

United States v. Kahn, supra at 264.

13. Finally, the Government revealed the existence of the Hedges-Kahn tapes before Hedges' testimony in the Romano trial (Tr. 111-12):

MR. LEISURE: Your Honor, with respect to the 3500 material, I have produced certain 3500 material, which relates to the bribe attempt of Hedges by Frances Kahn and the co-defendant Pacelli. The government's position was that that was not relevant to these proceedings inasmuch as Pacelli is not on trial. Nevertheless, I

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have turned that over to defense counsel rather than burdening the Court with it.

I have also advised defense counsel that there are certain tape recordings of conversations between Charles Hedges and Frances Kahn. The government's position with respect to those I have stated that I will make those tapes available to defense counsel, if they care to listen to them.

14. Petitioner claims that an affidavit by Hedges concerning the recordings was likewise suppressed. This is a bald conclusion, unsupported by any reference to the record. Such unsupported allegations cannot form the basis of any relief and raise no issue of fact. 28 U.S.C. §2255. Even if true, as Judge Bensal commented in Armone, the Hedges-Kahn matter was irrelevant to the Armone trial. However, the affidavit was marked as Government Exhibit 22 during the Armone trial on April 27, 1965. See Exhibit 1 annexed hereto.

15. Petitioner claims that the nondisclosure of the assistance given to Hedges by Dugan in locating an apartment for Hedges affected petitioner's ability to attack Hedges' credibility in the Armone trial. During Hedges' five and one-half days of cross-examination, there was much testimony to show the "relationship" between Dugan and Hedges. For example Hedges testified that he spoke with Dugan on many occasions. Armone Tr. 400, 478. Defense counsel's failure to adduce the fact of Dugan's assistance to Hedges in finding an apartment would not have affected the jury's verdict. That fact was cumulative at most along with the other facts already establishing Hedges' criminal record and his relationship with the Government.

16. Petitioner accuses Hedges and Agent Dugan of perjury in Armone concerning the reduction of Hedges' sentence by Judge Timbers in Connecticut. It is a gross understatement to say petitioner's claim lacks specificity in support of these allegations. Nowhere, however, does he cite a single perjurious statement made by Hedges or Dugan. Such unsupported conclusory allegations and speculation do not raise issues which would require an evidentiary hearing, nor require the granting of the ultimate relief petitioner seeks. cf. Burris v. United States, 403 F.2d 399, 402 (7th Cir. 1970), cert. denied, 401 U.S. 921 (1971).

Further, the following statement of Judge McLean to counsel in the Kahn trial on March 7, 1966, as to the circumstances of the Hedges' reduction of sentence and the bail application are instructive (Kahn Tr. 1410-13):

THE COURT: Gentlemen, I wanted to tell you that last Saturday evening, I think it was March 5th, I telephoned Judge Timbers at his home in Darien where he was for the weekend and discussed with him the subpoena which Mr. Schwartzberg had served upon him.

Judge Timbers told me that he is in Syracuse where he is sitting by assignment of the Chief Judge of the circuit, that he is trying the case of U.S. against Goren, which is a criminal case, income tax evasion, that the case is supposed to last three or four weeks, that he began it last week, and in order to expedite matters as much as possible last week he sat to 6 p.m. and on one day 7:30 p.m.

There are many witnesses and this apparently is considered by the

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Government up there in Syracuse to be a very important criminal case. He said it would seriously disrupt the business of his court if he had to take a day off, at least a day would be required to journey down here to testify.

He said he would do so if I asked him to, but he felt very strongly that it would be disruptive to the due handling of that case in Syracuse.

I then asked him what he would testify to if he came and I explained to him that I had understood from Mr. Schwartzberg that Mr. Schwartzberg wished to inquire into, in substance, the circumstances surrounding the reduction of Hedges' bail and subsequent reduction of Hedges' sentence.

Judge Timbers had the following to say:

He said in the first place, he didn't have any documents of the nature referred to in the subpoena which I take it called for the production of diaries and records and so forth. He has no diaries, he has no records other than the regular court records on file in Connecticut.

He said that he had no recollection of the circumstances with respect to the reduction of bail in 1962. He said that with respect to the reduction of sentence in 1963, he had a clear recollection. He said that this came about on his initiative. He said that after the conviction of Hedges was affirmed and the conviction of the others was reversed, it seemed to him that in fairness some reduction should be made in Hedges' sentence since Hedges was at that point the only one who had been convicted and who had a sentence facing him.

He said he spoke to the then United States Attorney in Connecticut, a Mr. Markel, who was not, apparently, the United States Attorney who had tried the Hedges case and who had no personal knowledge of the situation, and asked Mr. Markel to find out whether the Government would have any objection to a reduction of Hedges' sentence.

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As a result of that inquiry, Mr. Markel brought Mr. Dugan in to see Judge Timbers. Judge Timbers said that he asked Mr. Dugan whether the Government would have any objection to a reduction of Hedges' sentence and Mr. Dugan said it would not.

Mr. Dugan, according to Judge Timbers, didn't make this request. The initiative came from Judge Timbers himself.

Judge Timbers said that he advised Mr. Dugan that he thought a formal motion should be made by Hedges for this relief and it is his best recollection that he asked Mr. Dugan to communicate with Hedges' attorney to that effect, or with Hedges himself.

Thereafter, Miss Kahn made the motion, as we all know, and Judge Timbers reduced the sentence.

I think that covers what Judge Timbers told me. He also said that when the motion was made, no opposition papers were filed. There was no argument or hearing on the motion. His action in granting it was, according to his recollection, merely by an endorsement on the papers without any opinion.

I told Judge Timbers, and I will state here, that in view of these facts, it does not seem to me that anything Judge Timbers could testify to in this matter would be of any assistance whatever to Mr. Schwartzberg and under those circumstances I will not interrupt the due administration of judicial business in the Northern District of New York by requiring Judge Timbers to come here. I therefore quash the subpoena for that reason.

I am not ruling on the question of privilege or on the relevance of any testimony that Mr. Schwartzberg may seek to elicit from Mr. Dugan. He is free to call Mr. Dugan, if he wishes.

17. Petitioner claims that Hedges committed perjury in his testimony concerning his expectations of Government help. This claim is based on conclusory allegations by Godwin, Hedges cousin, who testified in the Romano trial. Godwin did not specifically name any agents or hear any of the alleged promises about which Hedges allegedly told him. Godwin was called as a witness by the Government at the Armone trial. He was under subpoena as a Government witness for Romano trial, but during the course of the trial the Government was informed that Godwin had been contacted by a brother of two of the defendants on trial, through an intermediary, and that as a result he intended to "ruin" the Government's case. Romano Tr. 485, 488. Godwin was thereupon turned over to the defense, and he was ultimately called as a defense witness. The Romano jury was able to determine Godwin's credibility in view of the circumstances of his testimony. Apparently it concluded that Hedges was to be believed, for the defendants were subsequently convicted.

Since this evidence, if true, would be merely impeaching in character, and not material to the factual issues at the Armone trial, and would not probably produce an acquittal upon a retrial, see United States v. Costello, 255 F.2d 876 (2d Cir.), cert denied, 357 U.S. 937 (1958), a

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hearing is unnecessary and the claim should be rejected.

18. Petitioner's claim of a delayed implication of himself by Hedges, even if true, is irrelevant and in no way satisfies the burden of showing prejudice to petitioner.

19. Similarly petitioner's claim with respect to the suppression of alleged pending charges against Hedges is unsupported and frivolous, and the Government was and is unaware of the existence of any such evidence which should have been furnished to petitioner.

20. Finally, petitioner's claim with respect to money found on Hedges at his arrest evidences no impropriety on behalf of the Government. Again, even if true, it would not support the claim of knowing use by the Government of perjured testimony.

WHEREFORE, the Government respectfully requests that the petition be denied in all respects without a hearing.

---

RONALD L. CARNETT  
Assistant United States Attorney

Sworn to before me this  
13th day of May, 1976.

EXHIBIT 1

GOVERNMENT  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

APR 27 1975

22nd

State of New York )  
County of Westchester)

I Charles Hedges, age 32, a Federal prisoner, being held at the Westchester County Jail, Elmsford, N.Y. as a potential Federal witness, deposes and says: That I retained Mrs. Frances Helm to represent me in my trial in the U.S. District Court, New Haven, Conn. and in the subsequent appeal of this case, which was disposed of in March 1963; that she continued to visit me after this date although she is no longer my attorney and does not represent me in any manner. That she told me that she had seen Vincent Accilli (one of the subjects of the case that I am to be a witness in.) and that he said he would take care of all of the expenses of both my first and second wife and of the children, while I was in jail and that when I go out, he would see that I had nothing to worry about, if I did not testify.

That on another occasion she said that Accilli had said that if I testified about any of the others and left him out of my testimony, he would be killed. She also said "they know that you have not been to the Grand Jury yet, if you go, will you let me know before you are called".

That whenever she speaks to me about the case, she indicates that she is afraid that her conversation will be overheard, because she turns up the volume of a small transistor radio which she brings with her, and on another occasion she avoided mentioning the name of Accilli by writing it on a piece of paper, which she thereafter placed in her handbag.

That I wish to cooperate with the Federal authorities to assist them in obtaining evidence against the suspects in this case. I make this offer for that purpose and consent that any and all future conversations between myself and Mrs. Kohn may be intercepted and put to use by the Federal Government for whatever purpose it deems fit.

---

Sworn to before me this  
day of

RLG:js

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

VINCENT PACELLI,

:

Petitioner,

: GOVERNMENT'S AFFIDAVIT IN  
RESPONSE

-v-

: 75 Civ. 3624  
(64 Cr. 828)

UNITED STATES OF AMERICA,

:

Respondent.

:

-----X

STATE OF NEW YORK )

COUNTY OF NEW YORK :

ss.:

SOUTHERN DISTRICT OF NEW YORK )

RONALD L. GARNETT, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the United States of America, and as such I am familiar with this matter, and I make and submit this affidavit in response to petitioner's reply to the Government's previous affidavit in opposition to petitioner's motion, pursuant to Title 28, United States Code, Section 2255, for an order vacating his conviction and sentence, or for an evidentiary hearing.

2. I am the Assistant United States Attorney who submitted the Government's previous affidavit in opposition. The affidavit was sworn to and submitted based upon a thorough and exhaustive review of the entire record in United States v. Alfred Armone, et al., 64 Cr. 828, and United States v. Frances Kahn, 65 Cr. 999, including four trial transcripts, exhibits and discovery material.

WHEREFORE, the Government respectfully requests that the petition be denied in all respects without a hearing, for the reasons set forth herein and in all the papers filed previously and in the Government's accompanying memorandum of law.

---

RONALD L. GARNETT  
Assistant United States Attorney

Sworn to before me this  
day of July, 1976.

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

VINCENT PACELLI

No. Civ. 3624-75(DEB)

AFFIDAVIT IN  
SUPPORT OF  
MOTION TO VACATE

Vincent Pacelli, being first duly sworn, states as follows:

1) I am the petitioner in the above captioned matter and was a  
defendant in United States v. Armone

2) At no time prior to or during my trial was I aware that any  
tapes had been made of conversations between Charles Hedges and  
Frances Kahn.

Vincent Pacelli

Subscribed and sworn to before me this      day of June, 1975.

\_\_\_\_\_

#9 35

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

VINCENT PACELLI

No. Civ. 3624-75(DBB)

MEMORANDUM  
IN REPLY TO GOVERNMENT'S  
AFFIDAVIT IN OPPOSITION

Preliminary Statement

Petitioner finds unfathomable the practice of the United States Attorney's Office, acquiesced in by this court, of the execution and filing of affidavits wherein an Assistant United States Attorney swears on his oath to facts he could not possibly know, to legal arguments which are far from factual, and to characterizations highly debatable at best. In short, the efficacy of the oath is consistently undermined and flouted by swearing to the truth of briefs.

In the instant case, for example, an assistant who may well have been in high school when the events occurred, swears to the truth of events occurring in 1964, twelve years ago. He even swears that Hedges "committed perjury" in his trial in 1961, sixteen years ago (aff. p. 3); that Hedges began cooperating "in July, 1962" (Id., par. 3); that some of petitioner's claims are "wholly without merit" (par. 10); that his claim that he was not told of the Hedges-Kahn tapes "is false" (par. 11); that the Hedges affidavit "was marked as Government Exhibit 22 during the

Armone trial on April 27, 1965" (par. 14). He even swears that "the Government was and is unaware of the existence of any...evidence" of suppressed pending charges against Hedges (par. 19). How Mr. Ronald L. Garnett can swear to such "facts" is a mystery.

Since, contrary to his sworn claims, Mr. Garnett knows nothing about the matters in issue other than what he has gleaned from the records, it is respectfully submitted that his "affidavit" should be stricken as such and treated merely as a memorandum of law.

It is no less puzzling to learn from Mr. Garnett's "affidavit" that the Government has access to and feels free to quote from portions of the transcript (e.g. p. 923-28) of the Armone trial which were impounded by the court. Petitioner, on the other hand, who on July 25, 1975, filed a motion with this court (see Docket Sheet in 62 CR. 328) to release the impounded minutes, has never been permitted to examine them. The first he heard of the colloquy at p. 923-28 was in Mr. Garnett's "affidavit" (par. 11).

1. Failure to disclose the Hedges affidavit and the Hedges-Kahn tapes; perjury by Hedges and agent Dugan

Relying on the transcripts of the post-Armone trials in United States v. Kahn, 56 CR. 999 (1966), and United States v. Guante, 64 CR. 828 (1969), petitioner alleged that the Government failed to disclose for his use the impeaching material (s3500 and Brady), provided by Hedges' affidavit and the recorded conversations between Hedges and Kahn, his putative attorney at the time (pars 7-9, 12). Petitioner also alleged that the Government knowingly relied on Hedges' perjury relating to these conversations (par. 10) and on agent Dugan's perjury, denying that any tapes were made (par. 11). The Government's response is wholly inadequate.

a. The Hedges affidavit

Petitioner stands partially corrected concerning the Government's alleged suppression of Hedges' affidavit (G. Ex. 22 id.). It appears that the affidavit was tendered to the Court and the Court then ordered turned over the first sentence (ending with "in any manner") and page 2 (TR. 414). The essence of petitioner's claim remains, however. What was turned over did not give the slightest inkling that any conversations between Kahn and Hedges related to petitioner, or even to the case. What was excised, on the other hand, contained numerous statements, allegedly made by petitioner and communicated to Hedges through Kahn. Thus, the skeleton of the affidavit was disclosed while the flesh and entrails were secreted.

If non-disclosure, by the Court, of the meaty portions of the affidavit stood alone, there would be no §2255 motion. But it is a vital part of the context in determining the fundamental unfairness of petitioner's trial.

b. The Hedges-Kahn tapes

As alleged in the petition (par. 8) and as established in the subsequent Kahn trial, Hedges, prior to petitioner's trial, under the Government's direction, engaged in conversations with attorney, Frances Kahn, concerning his testimony against petitioner and others. Kahn claimed to be acting as petitioner's agent, offering various inducements to Hedges to alter his testimony. Hedges expressed interest and discussed the facts of the case, including the notion of changing the dates of transactions so as to bring the statute of limitations into play. The Government does not and cannot deny that these statements were §3500 material. They clearly

bore on the witness' willingness to simulate and fabricate about the case and to draw his own attorney into a conspiratorial web. Furthermore, they were statements about and, in part, by petitioner, through his alleged agent, Ms. Kahn, and producible as such. That they were producible was admitted by the Government in United States v. Guanti. There, after turning over the material, Mr. Leisure, for the Government, said:

"The Government's position...is that that material relates to the bribe attempt of Hedres, and accordingly it has no place in this case, although it did at the previous trial because that subject came up on the issue of Pacelli's consciousness of guilt." (TR. 121).

The Government's sole claim regarding that material now is that it was in fact disclosed to petitioner. Citing to pages of minutes still under an order of impoundment, which petitioner has never been permitted to see, the Government claims that the recordings were made available to counsel by the court on the express conditions that (1) no copies be made, (2) no use be made of the material for impeachment, and (3) the defendants not be informed of the contents of the tapes (Govt. aff. p. 8). If the foregoing actually transpired and petitioner must deny it until he is permitted to see the transcript-it is still no answer. The court manifestly denied petitioner the right to assist in the preparation of his own defense, and the right to assistance of counsel, in forbidding any disclosure of the tapes to petitioner himself. See Geders v. United States 44 4420 (Mar. 30, 1976). Disclosure to counsel, on such conditions, was manifestly not disclosure to petitioner. It was petitioner and only petitioner who could have told counsel whether the statements allegedly made to Kahn by him were true or false; only petitioner who could decide

whether to use such incidents and their contents to attack Hedges. Without petitioner's knowledge of the tapes, his counsel could not confer with him concerning vital steps in the defense and the right to counsel became an empty formality. Cf. Herring v. New York, 95 S.Ct. 2550 (1975); Maness v. Meyers, 419 U.S. 449 (1975).

c. Hedges' and Dugan's deceit about the Hedges-Kahn tapes

As alleged in the petition (par. 10), Hedges testified at petitioner's trial that the reason for Agent Dugan's frequent visits (more than 30 times (Armone TR. 764), to Hedges while he was in jail was to bring Hedges' wife to see him (TR. 764). In truth and in fact, Dugan visited Hedges to prepare him as a witness, to help him get a sentence cut, and to direct his recorded communications with Ms. Kahn, all of which appears in the Kahn trial. The Government's affidavit ignores this issue.

With respect to agent Dugan's false testimony, the Government claims (pp. 5-6) that Dugan merely denied that recordings were made of statements by Hedges to the Government. In context, however, it is clear that defense counsel twice asked about recordings of any conversations with any person concerning the case. Dugan's answers clearly conveyed to the jury and were intended to convey to the jury that there had been none. At best his testimony was intentionally misleading on the point, as the Government can hardly deny.

2. Failure to disclose Hedges' role as Government informer and agent-provocateur

As alleged in the petition (par. 13), and as proved in the Kahn trial, Hedges acted as a secret Government informer and agent provocateur from about September, 1963 through 1964, i.e. up to the eve of petitioner's trial in Armone. During this period, Hedges was actively engaged in

various forms of deception designed to produce evidence against petitioner. The Government actively directed his deception. Such evidence of desperate bias and persistent fabrication, had it been disclosed to petitioner and to the jury, would have cast a dark shadow over the credibility of Hedges. Petitioner's allegation that "No part of this relationship, none of this description, and none of this activity on the Government's behalf was known by or disclosed to the petitioner during his trial" is not denied by the Government.

3. Undisclosed Government assistance and relationship with Hedges

Closely related to Hedges' undisclosed role as a deceitful Government informant was his close relationship with agent Dugan, who, as established in United States v. Guanti, in March, 1969, was getting Hedges out on bail pending appeal, providing him an apartment, and visiting him constantly (Pet. par. 14). The Government's failure to disclose this assistance and this relationship deprived petitioner of vital evidence of Hedges' credibility, and unfairly protected from exposure as perjury Hedges' testimony at petitioner's trial that he was promised nothing and given nothing by the Government (Par. 14). Indeed, failure to disclose such assistance constituted the knowing use by the Government of perjured testimony.

The Government admits its suppression of the assistance given to Hedges by Dugan, but claims it was "cumulative" (Par. 15). This is ridiculous and irrelevant. The knowing suppression of evidence material to a Government witness's credibility is a violation of the Constitution and requires a new trial, whether or not it is "cumulative." Giglio v. United States, 405 U.S. 150 (1974); United States v. Morell, 524 F.2d 550, 554 (2d Cir. 1975).

#### 4. Hedges' sentence reduction

##### a. Hedges' perjury

Hedges swore at petitioner's trial that he conversed with no one in the Government about a sentence reduction. It was just dropped in his lap (Pet. par. 17). The facts of record, as disclosed in the Kahn trial, are otherwise. Judge Timbers asked agent Dugan if the Government would oppose a sentence reduction and Dugan said no. Judge Timbers then instructed Dugan to tell Hedges' or his attorney to file a motion (U.S. v. Kahn TR. 1410). By his own admission, Hedges caused the motion to be filed by directing his attorney to do so (TR. 1074). If Judge Timbers told the truth, therefore, it is clear that Hedges lied. Dugan did as he was instructed, told Hedges to have his attorney file the motion, and Hedges did so. Hedges' claim that he had no communication with the Government, etc. is therefore patently perjurious.

Furthermore, the perjury was committed with the full knowledge of the Government. Agent Dugan was present at the trial and heard it and knew it was perjurious. The importance of the issue, moreover, was underscored by defense counsel's repeated demands that the Government's role in the sentence reduction be disclosed (TR. 1072, 1404). The Government not only refused to disclose it, or correct Hedges' perjury, it took the position that nothing was communicated to Hedges (TR. 1406, 1413, 1415). The Government's response to these record facts is a monument of obfuscation and evasion (Par. 16) that essentially admits the facts.

##### b. Agent Dugan's perjury

Agent Dugan, who was present throughout Hedges' perjury, and the defense demands for disclosure of the Government's role in the sentence

reduction, not only sat in silence; he committed perjury when asked under oath if he told Hedges to move for a sentence reduction (TR. 3333-34). Judge Timbers advised him to so inform Hedges. And Hedges caused the motion to be filed. Are we to believe that Dugan disregarded Judge Timbers' instructions? Are we to believe that Hedges applied for a sentence reduction without discussing it with his constant companion, confidante, and co-complicitor agent Dugan? To believe that is to believe in the impossible. The Government's sole response is to label these allegations (Pet. par. 20-22) "conclusory" (Par. 16). The conclusions, however, are firmly based on Judge Timbers' account of the facts and are irresistible. Had Judge Timbers' version of the facts been disclosed to the defense and thus to the jury, both Hedges and Dugan would have rightly been found to be liars.

5. Hedges' expectations of Government help-more knowing use of perjury

Hedges' claim that he was "Offered nothing, promised nothing...asked for nothing" (TR. 1070) and "expected to get nothing" (TR. 972) was known to be perjurious by the Government. As earlier noted, the Government suppressed evidence that Dugan was instrumental in getting the sentence reduction, with Hedges' full knowledge; the Government also suppressed evidence of Dugan's close relationship with Hedges, and his having provided a place for Hedges to live (Pet. par. 14) and Hedges' active role as Government provocateur (Section 2 supra). Furthermore, as James Godwin testified in Quanti, Hedges admitted to him that the Government promised him everything and documentary evidence proves Hedges received \$3000 (Pet. par. 25).

As to all this, the Government merely attacks the credibility of

Godwin, claiming that in a trial subsequent to petitioner's, U.S. v. Romano (1969), Godwin gave the testimony and the jury still believed Hedges (Par. 17). This is beside the point. The jury was entitled to hear the evidence in petitioner's trial. Moreover, the argument ignores all the other suppressed evidence of Hedges' perjury. The Government's claim that evidence may be suppressed unless its non-suppression would have produced an acquittal (Par. 17) is silly. That is close to the test for newly discovered evidence (but see United States v. Miller, 411 F.2d 825 (2d Cir. 1968) but nothing is clearer than that knowing suppression of evidence voids a conviction so long as material to credibility. United States v. Morrell, supra. Moreover, it has been clear since Napue v. Illinois, 360 U.S. 264 (1959), that knowing use of perjured evidence, without more, invalidates a conviction.

6. Hedges' "delayed" implication of petitioner

Petitioner's allegations (Pars. 28-31), based upon the sworn testimony of Hedges in United States v. Kahn (1966), that although he began cooperating with the Government at least as early as July, 1962, he did not implicate petitioner until December, six months later, is disposed by the Government as "irrelevant" (Par. 8). Hedges' and Dugan's testimony about Hedges' cooperating in July, 1962 (TR. 384), however, was grossly deceptive, if not perjurious. Despite his close relationship with Dugan, as earlier noted, it took Hedges six months to insert petitioner in the conspiracy. Either Hedges "cooperation," which both he and Dugan swore began in July was prevarication and concealment-fake cooperation-or his later insertion of petitioner was perjurious. This decision was one the petitioner was entitled to have the jury make. By deceptively asserting that "cooperation"

began in July, and failing to disclose the half-year delay concerning petitioner, the Government committed a fraud on petitioner and on the jury. This was vital evidence to the defense, as the Government well knew. Its suppression alone would require a new trial.

7. Suppression of pending charges

As alleged in the petition (Par. 32), Hedges had been arrested while out on bail, in December, 1962, because of a gun battle he was involved in. The State authorities lodged a Sullivan Act charge against him. As a result of a wound he received in the battle, Hedges was incarcerated in Kings County Hospital (See TR. of Motion to Suppress United States v. Kahn, Feb. 15, 1966, pp. 12-18). This charge was still pending in 1966 (Id. at 13). The Government's response to petitioner's claim that the pending charges were suppressed during petitioner's trial is that it is "unsupported and frivolous" (Par. 19). Yet Hedges himself so testified in United States v. Kahn, and there seems to have been no doubt about it at that time. Moreover, there can be no doubt that the Government, e.g. Agent Dugan, was aware of the charges. Hedges was a cooperating federal witness at the time he got in the gun battle, living in an apartment provided by agent Dugan, got out on bail by agent Dugan, and visited in the hospital, after the gun battle, by agent Dugan. To suggest that the Government had no knowledge of the charges would be preposterous. That the pendency of the charges was a material factor in evaluating Hedges' bias is basic. That such charges were not disclosed to petitioner is borne out by the record. Nowhere does the Government cite any record suggestion that petitioner knew of any such charges.

#### 8. Perjury about money

The Government does not deny that Hedges lied in petitioner's trial when he swore that \$1500 found on him when arrested was won in a crap game. (He admitted in Kahn that it came from a robbery (TR. 480) for which he could still be prosecuted). The Government simply says that petitioner hasn't proved Governmental impropriety (Par. 20). Surely, however, when perjury by a Government witness is established by the subsequent testimony of that same witness, testifying for the Government, about a matter as central to impeachment as this, a prima facie case of suppression is made out. The burden is shifted to the Government to explain that it learned the truth after petitioner's trial. Not even a hint of such an explanation appears in the Government's response.

#### Conclusion

Record facts clearly establish a web of instances in which the Government obtained petitioner's conviction with known perjury. These facts are neither refuted nor contested by the Government. Accordingly, the motion should be granted forthwith.

Alternatively, if the full extent of the Government's culpability must be established, an evidentiary hearing is required. United States v. Hilton, 521 F.2d 164 (2d Cir. 1975).

Respectfully submitted,

Vincent Pacelli, pro se  
Atlanta, Georgia

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

VINCENT PACELLI,	:	
	:	
Petitioner,	:	GOVERNMENT'S AFFIDAVIT
	:	<u>IN RESPONSE</u>
-v-	:	
	:	75 Civ. 3624 (DBB)
UNITED STATES OF AMERICA,	:	(64 Cr. 828)
	:	
Respondent.	:	

-----X

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK)

RONALD L. GARNETT, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Attorney for the United States of America, and as such I am familiar with this matter, and I make and submit this affidavit in response to petitioner's (1) Reply to Government's Memorandum of Law, (2) Petition for Declaratory Relief and Summary Judgment, (3) Petition for Relief from Final Judgment and Order, pursuant to Rule 60(b), Federal Rules of Civil Procedure, (4) Motion for Delivery of Transcripts, and (5) Supplemental Memorandum in Support of Petition for Reconsideration, all file filed in connection with this Court's denial of petitioner's motion, pursuant to Title 28, United States Code, Section 2255, for an order vacating his conviction and

sentence, or for an evidentiary hearing.

2. In petitioner's reply dated August 9, 1976, to the Government's Memorandum of Law, petitioner claims that the Government's statement concerning the witness Hedges expectation of assistance was unsupported by the Government's deliberate omission of "any transcript citation". He further surmises that the Government "may" be relying upon a portion of the record to which petitioner has no access or to which he is unaware. The Government submits that its characterization of Hedges' testimony is supported by the record, unsealed and available to petitioner. Further, the pages of the record, to which the Government refers i.e., pp 972 and 1070, were cited by petitioner in paragraph 5 of his earlier Memorandum in Reply to Government's Affidavit in Opposition filed on August 12, 1976, and these are the very same pages petitioner contends support his position and so put in controversy.

3. In petitioner's Petition for Declaratory Relief and Summary Judgment, again petitioner accuses the Government of going "'...off the record.'" by inserting erroneous statements attributed to a crucial Government Witness..." and of referring to a second set of records not available to petitioner. He claims these Government responses were made in an "undated second reply" entitled Government's Memorandum of Law. The Government submits that at page 7 of its Memorandum referred to by petitioner, and filed in

this Court on July 29, 1976, Hedges did testify (Tr. 970-72) as to his expectation of future assistance from the Government. And, again the Government submits these pages were cited by petitioner, supra para. 2. Petitioner cites Taylor v. United States, 487 F.2d 307 (1973), in support of his request for a hearing. Clearly from reading of this decision, no issue of fact is present necessitating a hearing and that decision is inapposite. The Government requests this court to rely only on the factual statements in the record, as cited in its many opposing papers, and not upon the factual statements of the affiant.

4. In petitioner's petition for Relief from Final Judgment and Order, pursuant to Rule 60(b), Federal Rules of Civil Procedure, filed September 22, 1976, he claims the Government perpetrated a fraud upon the court in referring to non-existent records and files in its opposition papers. The Government stands on its position in paragraphs 2 and 3, supra, in response to this allegation. Further, the Government has neither misrepresented nor misstated the record of this case as to any of its contentions, and petitioner has utterly failed to present a scintilla of evidence by way of his own affidavits to suggest any impropriety by the Government in opposing his motions. And, this Court in its order dated September 8, 1976, denying petitioners motion made clear its decision was based upon the record of the trial

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the affidavits of the Government.

5. In petitioner's motion for Delivery of Transcripts, dated September 20, 1976, although not docketed with the court as reflected in the docket sheet for this matter, he claims the Government quotes from sealed transcripts which he has not seen. The Government again refers the court to the docket in United States v. Armone, 64 Cr. 828, where on November 10, 1965, this court ordered all records unsealed. (see attached order). Further, other than as previously alleged and refuted by the Government, petitioner cites no other portions of the transcript referred to by the Government in its opposing papers and to which record petitioner has had no access.

6. Finally, in his Supplemental Memorandum in Support of Petition for Reconsideration, dated October 1, 1976, petitioner raises no new claims not previously responded to by the Government, and, therefore, the Government rests on its previously filed answers.

---

RONALD L. GARNETT  
Assistant United States Attorney

Sworn to before me this  
15th day of October, 1976.

HLJ:mb  
36703

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA, :

-v- :

ALFRED ARMONE, et al., :

Defendants. :

ORDER

64 Cr. 840

-----x

Certain documents, exhibits and portions of transcripts having been sealed during the course of the trial of United States v. Alfred Armone, et al., 64 Cr. 840 by the direction of the Honorable Dudley B. Bonsal, United States District Judge and said trial having now been concluded it is hereby

ORDERED that all said documents, exhibits and portions of transcripts heretofore sealed shall be unsealed.

Dated: November , 1965

\_\_\_\_\_  
U. S. D. J.

SO ORDERED:

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M-2042

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- -x

VINCENT PACELLI, :

Petitioner, :

- v -

: 75 Civ. 3624 (DBB)  
: (64 Cr. 828)

UNITED STATES OF AMERICA, :

Respondent. :

----- -x

GOVERNMENT'S MEMORANDUM OF LAW

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America.

RONALD L. GARNETT  
Assistant United States Attorney

- Of Counsel -

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VINCENT PACELLI,	:	
	:	
Petitioner,	:	
	:	
- v -	:	75 Civ. 3624 (DEB)
	:	(64 Cr. 828)
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
	:	

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MEMORANDUM OF LAW

The Government respectfully submits this memorandum in rejoinder to the petitioner Vincent Pacelli's Memorandum in Reply to the Government's Affidavit in Opposition. This memorandum is filed in opposition also to petitioner's motion to be enlarged on bail pending such a hearing, or in the alternative, to be transferred to the Federal Metropolitan Correctional Center in New York City.

POINT I

PETITIONER'S CLAIMS ARE FRIVOLOUS  
AND WITHOUT MERIT AND HE IS EN-  
TITLED TO NO RELIEF.

Petitioner's Memorandum in Reply to the Govern-  
ment's Affidavit in Opposition (hereinafter referred as  
"Reply") charges serious error on the part of this Court

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and serious misconduct on the part of Government witnesses, attorneys, and agents, including perjury, subornation of perjury, and willful suppression of material evidence. Most of these same charges can be found in petitioner's Motion to Vacate Sentence. Only these contentions which are <sup>novel</sup> ~~moved~~ will be answered here; for the others the Government rests on its original Affidavit in Opposition.

The Government's argument, in brief, is that the court should exercise its discretion to deny a hearing to a petitioner who raises only insubstantial claims, Sanders v. United States, 373 U.S. 1, 20 (1963), on the grounds that the allegations of subornation of perjury are contradicted or unsupported by the record before the court, United States v. Romano, 516 F.2d 768, 771 (2d Cir. 1975); United States v. Sobell, 142 F. Supp. 515, 519 (D.S.D.N.Y. 1956), aff'd 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957), and the allegations of suppression of evidence fail to meet the standard of error enunciated in United States v. Agurs, 44 U.S. Law Week 5013 (June 24, 1976).

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A. The Hedges - Kahn Tapes

These tapes can not properly be considered statements of a Government witness producible under 18 U.S.C. Section 3500. At the time of petitioner's trial in 1965, a "statement" for the purposes of Section 3500 was defined as

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. 18 U.S.C. Section 3500(e). (Emphasis supplied.)

The Hedges-Kahn tapes record primarily the suggestion of Kahn that Hedges perjure himself at the up-coming trial of petitioner; they are therefore not statements "by a Government witness." Moreover, since neither Hedges nor Kahn was employed by the United States, they can not be considered statements "to an agent of the Government." See United States v. Crisoner, 416 F.2d 107, 112-4 (2d Cir. 1969), cert. denied, 397 U.S. 961 (1970).

As to disclosure, petitioner expresses puzzlement that the Government should freely quote from

pages of the trial transcript allegedly under impoundment by the Court. Reply at 2, 4. He forgets the facts of his own case. The docket sheet for 64 Cr. 828 shows that on November 10, 1965, Judge Bonsal ordered unsealed all documents, exhibits, and portions of transcript which had been sealed during the course of trial; and that on August 14, 1975 Judge Frankel dismissed as moot petitioner's own motion of July 25, 1975, to release impounded minutes.

Assuming arguendo that the tapes were 3500 material, their existence was therefore disclosed by the Government to the court and by the court to defense counsel. What remains of petitioner's complaint must run entirely against the court for instructing counsel not to disclose the existence of the tapes to any clients (Tr. 925). The reasons for this instruction were fully and clearly stated by the court at that time. It found that as evidence the tapes were collateral in nature, Tr. 923, were likely to prejudice the defendant, Tr. 924, and might confuse the jury on the issues, Id. The Government supports this reasoning and considers the court's action to be within its inherent power to control the administration of justice. See Rule 403,

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Federal Rules of Evidence; United States v. Pfingst,  
477 F.2d 177, 195 (2d Cir.), cert. denied, 412 U.S. 941  
(1973).

It is finally alleged that Hedges and Dugan testified falsely in connection with the tapes. According to petitioner, "Hedges testified... that the reason for Agent Dugan's frequent visits ... was to bring Hedges' wife to see him." (Reply at 5.) Hedges' actual testimony is sufficient answer to this characterization:

THE WITNESS: Mr. Dugan would pick up my wife to take her home on visiting days. This is why there is a number of times that Mr. Dugan was there, and when Mr. Dugan did this, we chatted about different things unrelating to this. Tr. 764-5. (Emphasis supplied.)

Clearly, Hedges does not allege that his visits with his wife explain every visit by Dugan, <sup>or</sup> ~~on~~ that other topics were not discussed when he was in Dugan's company. As to petitioner's contention that Dugan's testimony about recordings was "intentionally misleading," Reply at 5, Dugan truthfully answered the question that was put to him as ~~it~~ it was phrased by the court. A motion under Section 2255 is not the remedy for petitioner's ineffective cross-examination.

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B. The Hedges Affidavit

The reasons and authority which support the court's handling of the Hedges-Kahn tapes, supra, apply equally to the suppression by the court of those parts of Hedges' affidavit of September 20, 1963 that relate to Kahan's pressure tactics to persuade Hedges to commit perjury. Petitioner admits that this non-disclosure alone can not support a motion pursuant to Section 2255. Reply at 3.

C. Government Assistance To Hedges

Since the Government wrote its affidavit in Opposition, the Supreme Court has endorsed its position on the non-disclosure of evidence of Government assistance to Hedges. In United States v. Agurs, supra, the Supreme Court stated that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have effected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 5016-7. Constitutional error, the Court found, has been committed only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 5017. As the Government has previously argued, during the five and one-half days of cross-examination of Hedges

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ample evidence was developed to show the "relationship" between the witness and Dugan. Further evidence of assistance by the Government was therefore strictly cumulative, and would not have created a reasonable doubt that did not otherwise exist. See also United States v. Gugliaro, 501 F.2d 68, 73-4 (2d Cir. 1974).

In addition, petitioner now contends that the prosecution suborned perjury in allowing "Hedges' testimony at petitioner's trial that he was ... given nothing by the Government," Reply at 6, to remain uncontradicted. The Government finds no testimony to this effect at the pages cited by petitioner (Tr. 972, 1070). Hedges did testify as to his expectation of future assistance from the Government, both when he began cooperating and at the time of trial, and the truth of this testimony is considered below.

D. Hedges' Role As An Informer

Disclosure of Hedges' role as an informer would have created no new reasonable doubt of petitioner's guilt. Agurs, supra, at 5017. This evidence would only have further inculpated the defendant. Hedges became an informer after he was approached by Kahn, and Kahn's proposal to Hedges that he change his testimony was the strongest evidence of petitioner's consciousness of guilt.

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"The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him..., but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939 (1973).

Petitioner's argument that one who informs against a crime is guilty of "desperate bias and persistent fabrication," Reply at 6, is philosophically consistent with his conviction of conspiracy to obstruct justice and to suborn perjury.

E. Hedges' Expectation of Government Help

There is no inconsistency whatsoever between Hedges' testimony and the evidence of his relationship with Dugan or of his role as an informer or of his subsequent receipt of money from the Government. As for Godwin's later testimony, the Government relies on its previous statement.

F. Hedges' Sentence Reduction

Petitioner has changed the basis for his accusation that the prosecution made knowing use of false testimony. In his original motion perjury was said to lie because of inconsistencies between the Government's testimony

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and an imagined sequence of events leading to the reduction. Motion to Vacate Sentence at par. 21. The Government responded by directing petitioner to Judge Bonsal's account, in Kahn, of Judge Timbers' recollection of the circumstances of the sentence reduction. Affidavit in Opposition at 12-14. Petitioner now claims that there are inconsistencies amounting to perjury between Judge Timbers' account and the Government's account of Hedges' sentence reduction. This claim is utterly frivolous.

At none of the cited pages (Tr. 1406, 1413, 1415) can the Government find where the Assistant United States Attorney "took the position that nothing was communicated to Hedges [about a reduction in sentence]," Reply at 7. The testimony of Dugan that he did not tell Hedges to make an application for reduction of sentence, Tr. 3333-4, and the testimony of Hedges that he did not discuss his sentence with Dugan at the time he was drawing up his notes, Tr. 1070, is consistent with Judge Timbers' recollection that he "asked Mr. Dugan to communicate with Hedges' attorney ..., or with Hedges himself," Kahn Tr. at 1410.

Even if the Government's witnesses testified falsely - a supposition for which there is not a shred of evidence - Judge Timbers' account shows that it was on the court's initiative, and because of events in an unrelated case, that the sentence of Hedges was reduced.

G. Hedges' Delayed Implication of Petitioner

There is no inconsistency in the facts to support the charge of perjury. The Government rests on its previous answer.

H. Pending Charges Against Hedges

Disclosure of the State Court charge pending against Hedges, if any in fact did exist, would not have created a reasonable doubt of petitioner's guilt that did not otherwise exist. Agurs, supra, at 5017.

I. Money Found on The Person of Hedges

Petitioner suggests that since he has shown that Hedges testified falsely about money found on his person at the time of his arrest, the government must prove that it had no knowledge that this was perjury. "It is hornbook law". however, "that [in] a collateral attack on a criminal conviction . . . the burden of proof is on the party <sup>seeking</sup> relief."

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Williams v. United States, 481 F. 2d 339, 346 (2d Cir.),  
cert. denied 414 U.S. 1010 (1973), including, where the  
charge is of subornation of perjury, the element of  
scienter, Castellano v. United States, 378 F. 2d 231,  
234 (2d Cir. 1967).

POINT II

PETITIONER SHOULD NOT BE ENLARGE  
ON BAIL

A petitioner who has had a full trial and appeal is  
in a very different posture from one who is incarcerated be-  
fore a judicial determination of his rights. Nowhere is  
this more significant than in the matter of bail. Glynn v.  
Donnelly 470 F. 2d 95, 97 (1st. Cir. 1972). As Mr. Justice  
Douglas stated in the denial of an application for bail in  
Aronson v. May, 65 S. Ct. 3, 5, 13 L. Ed. 2d 6 (1964):

This applicant is incarcerated because he  
has been tried, convicted, and sentenced  
by a court of law. He now attacks his  
conviction in a collateral proceeding.  
It is obvious that a greater showing of  
special reasons for admission to bail  
pending review should be required in this  
kind of case than would be required in a  
case where applicant had sought to attack  
by writ of habeas corpus an incarceration  
not resulting from a judicial determination  
of guilt. Cf. Yanish v. Barber, 73 S. Ct.  
1105, 97 L. Ed. 1037 (1953). In this kind  
of case it is therefore necessary to inquire  
whether, in addition to these being substan-  
tial questions presented by the appeal, there  
is some circumstance making this application

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exceptional and deserving of special treatment in the interests of justice. See Benson v. California, 328 F. 2d 159 (c. a. 9th Cir. 1964).

As stated by the court in Calley v. Callaway, 496 F. 2d 701, 702 (5th Cir. 1974), another case cited by petitioner, bail should be granted to a prisoner pending post-conviction habeas corpus review

only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective. (Authorities omitted.) (Emphasis supplied.)

Preceding argument (Point I) has shown that petitioner lacks a "clear and readily evident case on the facts." Glynn, supra, at 98. Nor are there any special circumstances warranting petitioner's enlargement.

Petitioner argues that to preserve his remedy bail may be required, since he "may be paroled or serve his sentence before a final determination of the merits of his petition can be made". If petitioner were released on parole, petitioner's case would not become moot, for he would still be subject to the conditions of parole. These constitute a significant restraint on his liberty. Jones v. Cunningham, 371 <sup>U.S.</sup> ~~6-5~~ 236, 243 (1963).

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Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He . . . might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime. Id. at 242.

Under these circumstances, there is no immediate danger of petitioner's case becoming moot through his release. Benson, supra. at 162.

Furthermore, the release of a convicted prisoner on bail in collateral proceedings would fail to protect the legitimate interest of the public in executing his criminal judgment. United States v. Nenna, 281 F. Supp. 388, 389 (S.D.N.Y. 1968). If the execution of sentences can be staved off as long as astute counsel can present arguable collateral attacks, criminals may never go to jail. Cf. Benson, supra. at 162, n. 2.

There are additional reasons to deny this particular petitioner's request for enlargement on bail. 1) When the Federal Bureau of Narcotics arrested petitioner's co-defendants in July, 1964, petitioner could not be found and was

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not found until September of that year when he was arrested. 2) The main Government witness, Charles Hedges, was shot during December, 1962. 3) In January, 1963, petitioner approached Hedges' wife and offered a large sum of money for her husband <sup>n</sup>not to testify. 4) The woman with whom petitioner was arrested disappeared shortly after petitioner's arrest and has not been <sup>seen</sup> since. 5) During the course of petitioner's trial a juror was approached and offered a bribe and consequently had to be excused. 6) On the eve of the trial two co-defendants, Michael Ricucci and Arnold Romano, each jumped \$5,000 bail. The testimony at trial showed that Ricucci was petitioner's partner. 7) Four other co-defendants, Joseph Cahill, Dominick Romano, Carmine Guanti, and Frank Sherbicki, were fugitives at the time of petitioner's trial. 8) Petitioner was first convicted of a violation of federal narcotics laws in 1947. In 1955 he was again prosecuted for violation of federal narcotics laws but was acquitted. 9) A previous decision to parole petitioner in 1975 was overruled by the Department of Justice in Washington. Although all the above-mentioned facts cannot be directly attributed to petitioner, it is submitted

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that they should all be considered in determining the risk involved in admitting petitioner to bail.

POINT III

PETITIONER SHOULD REMAIN INCARCERATED  
IN ATLANTA

Petitioner has shown no basis for his request to be transferred to another prison. Even if there is a judicial recommendation a prisoner has no right to be confined near the location of his trial, Lawrence v. Willingham, 373 F. 2d 731, 732 (10th Cir. 1967), i.e., near the court to which his Section 2255 petition would be directed.\* Authority in these matters is given to the Attorney General.

\* Moreover, it should be noted that presence of the prisoner is not required at the Section 2255 hearing he requests, Sanders v. United States 873 U.S. 1, 21 (1963), particularly where none of the issues of fact concern events in which he participated, United States v. Fisciotto, 199 F. 2d 603 (2d Cir. 1952), or on which he could offer material testimony, Sanders, supra, at 21.

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may designate as a place of confinement any available, suitable, and appropriate institution or facility . . . whether within or without the judicial district in which the person was convicted, and may transfer a person from one place of confinement to another. 18 U.S.C. Section 4082 (b).

Courts will not interfere with the discretionary exercise of this authority:

As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. Montanye v. Haynes, 44 U.S. Law Week 5051, 5042-3 (June 25, 1976).

Petitioner's argument, if it can be framed in constitutional terms at all, must stand on his right of access to the courts. Thus, he alleges that he "needs the assistance of counsel to further process his §2255 motion, and "is unable to communicate freely, speedily, or effectively with prospective New York counsel while confined in the Federal Penitentiary in Atlanta." Prison administrators, however, are not required to adopt every proposal that may

be thought to facilitate prisoner access to the courts.  
Procunier v. <sup>Martinez</sup> ~~Wes~~, 416 U.S. 396, 420 (1974). And  
the complete absence from petitioner's request of legal  
authority demonstrates that the availability of counsel  
argument has never been used to guarantee a prisoner's  
proximity to one particular lawyer.

The right of access to the courts "must be weighed  
against the legitimate interests of penal administration  
and the proper regard that judges should give to the ex-  
pertise and discretionary authority of correctional  
officials." Id. Here there are substantial governmental  
interests—in security, order, and economy — that dictate that  
petitioner remain in Atlanta. The same reasons that mili-  
tate against his enlargement on bail (Point II) argue  
against his transfer away from the maximum security faci-  
lity in Atlanta. The creation of a prisoner's right to  
be near the attorney of his choice would result in a  
massive and costly relocation of inmates. The Government  
is not now thought to be under an obligation to pay the  
transportation expenses to bring petitioner's attorney to

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Atlanta; there is no reason, then, that it should pay the expenses to bring petitioner to New York.

CONCLUSION

For the reasons stated, the Government respectfully requests that the several motions of the petitioner be denied in all respects.

Respectfully submitted,

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America

RONALD L. GARNETT  
Assistant United States Attorney

-Of Counsel-

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NEW YORK, N.Y. 10007

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UNITED STATES OF AMERICA :  
Respondent, :  
:   
-v- :  
:   
:   
VINCENT PACELLI :  
Petitioner.:  
-----X

No. Civ. 3624-75(DBB)

REPLY TO GOVERNMENT'S  
MEMORANDUM OF LAW

The petitioner respectfully submits the instant reply in response to the Government's Memorandum of Law in rejoinder to the petitioner's Memorandum in Reply to the Government's Affidavit in Opposition. This response is necessitated by the Government counsel's erroneous claim that: "Hedges did testify as to his expectation of future assistance from the Government,..." (Government's Memorandum, p. 7, par. 2; emphasis in original).

It is of particular interest to note that while the A.U.S.A., Ronald L. Garnett, has liberally sprinkled the Government's Memorandum of Law with transcript citations in other instances he has, however, pointedly omitted any transcript citation to support the uncorroborated assertion that "Hedges did testify as to his expectation of future=assistance from the Government,..." Of course, the possibility now surfaces that Government counsel may be working with/from a record that the petitioner never had access to nor was aware of. Be that as it may the petitioner believes that this expedition into semantic distortion is deliberate, for the sole purpose of misleading the Court.

Because of the foregoing reasons as well as for the reasons setforth in the petitioner's moving papers, the relief sought should in all respects be granted.

Respectfully submitted,

*Vincent Pacelli*

Vincent Pacelli, Petitioner  
Box PMB, 89010  
Atlanta, Ga. 30315

CERTIFICATE OF SERVICE BY MAIL

VINCENT PACELLI, after being duly by law sworn, deposes and says: That on this 9th day of August, 1976, he served a copy of the instant papers upon the U.S. Attorney for the Southern District of New York, all of which should constitute sufficient proof of service.

Yours etc.,

*Vincent Pacelli*

Vincent Pacelli, pro se  
Atlanta, Ga.

SWORN TO BEFORE ME THIS

9th DAY OF AUGUST, 1976

*[Signature]*  
Parole Officer-

Parole Officer: Authorized by the Act of  
July 7, 1955 to Administer Oaths (18 U.S.C.  
4004)

#1470

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*[Handwritten signature]*

FILED  
U.S. DISTRICT COURT  
SEP. 8 12 21 PM '65  
S.D. OF N.Y.

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VINCENT PACELLI,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.  
----- x

75 Civ. 3624 (PRO SE)  
(64 Cr. 828)

#45054

MEMORANDUM

BONSAL, D. J.

Petitioner, Vincent Pacelli, nearly eleven years after the jury trial on Indictment 64 Cr. 828, moves pursuant to 28 U.S.C. §2255 for an order vacating his conviction and sentence on the ground that his conviction was secured by the Government's use of perjury and suppression of impeachment evidence in violation of his constitutional rights. Petitioner also seeks bail pending determination of his Section 2255 motion.

Petitioner, along with eleven other defendants, was charged in Indictment 64 Cr. 828 with conspiracy to violate the federal narcotics laws, specifically, sections 173 and 174 of Title 21 of the United States Code. Following a seven-week jury trial, petitioner was convicted on June 22, 1965 and sentenced on July 29, 1965 to eighteen years imprisonment and a \$20,000 fine. The judgment of conviction was affirmed on appeal and certiorari was denied by the

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Supreme Court of the United States. United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, Viscardi v. United States, 385 U.S. 957 (1966).

On November 8, 1965, Indictment 65 Cr. 999 was filed charging petitioner and two others with conspiracy to obstruct justice and suborn perjury in violation of 18 U.S.C. §371. Following a declared mistrial, a second trial was commenced before Judge McLean in February, 1966, and on March 9, 1966, petitioner was convicted by a jury of the crimes charged. Petitioner's conviction was affirmed on appeal, United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966), and on March 30, 1966, petitioner was sentenced to two years imprisonment on both counts to run concurrently, but consecutive to the sentence imposed on him in the Armone trial.

In his moving papers, petitioner contends that: (1) certain materials, including tape recordings of certain conversations between the Government witness, Charles Hedges, and an attorney, Frances Kahn, were withheld from the defense in violation of 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1963); (2) that the Government relied on Hedges' false testimony at the trial and the false testimony of Agent Thomas Dugan of the Federal Bureau of Narcotics and Dangerous Drugs regarding the taped conversations between Hedges and Kahn; and (3) that the Government suppressed evidence of Hedges' role as informer-provocateur and of his close relationship with Agent Dugan involving alleged offers by the Government to help Hedges obtain a reduction of his sentence in return for his

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cooperation.

The Court was aware at the time of petitioner's trial that the Government was conducting an investigation with the assistance of Agent Dugan to determine whether or not petitioner was seeking to obstruct justice by sending Kahn to visit Hedges in the Westchester County Jail and to urge him not to testify at petitioner's trial and to repudiate his prior statements to the Government. While this investigation had no immediate relevance to the narcotics conspiracy for which petitioner was being tried at the time, petitioner's counsel was made aware of the investigation and given the opportunity to examine the materials, including tape recordings (transcript of U.S. v. Armone, 64 Cr. 828, at 923-28). Neither Pacelli's attorney nor any of the other defense attorneys chose to use any of this material as it would have obviously been seriously damaging to their clients' interest.

As to petitioner's contention that the Government suppressed evidence of its offer to help Hedges secure a reduction of his sentence, it is clear that Judge Timbers, who presided at Hedges' trial, initiated it following the affirmance of Hedges' conviction by the Court of Appeals. (Transcript of United States v. Kahn, 65 Cr. 999 at 1410-13).

In reviewing petitioner's other contentions concerning subornation of perjury by Agent Dugan and Hedges, the Court finds petitioner's allegations are either contradicted or not supported by the record. Furthermore, petitioner's contentions as to the suppression of evidence, even if taken as true, do not appear to meet the

standard of constitutional error as recently enunciated in United States v. Agurs, \_\_\_\_ U.S. \_\_\_\_, 44 U.S.L.W. 5013 (June 24, 1976).

Since petitioner's motion is without merit and is void of support in the trial record or in the affidavits submitted to the Court, the motion is denied without a hearing. 28 U.S.C. §2255; see, United States v. Romano, 516 F.2d 768, 771 (2d Cir. 1975); Williams v. United States, 481 F.2d 339, 345 (2d Cir.), cert. denied, 414 U.S. 1010 (1973).

It is so ordered.

Dated: New York, N.Y.  
September 8, 1976

  
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U. S. D. J.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NEW YORK, N.Y. 10007

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VINCENT PACELLI,	)	
Petitioner	)	
-v-	)	
UNITED STATES OF AMERICA,	)	
Respondent.)	)	
-----X	)	

75 CIV. 3624 (D.B.B.)  
(64 CR. 828)

PETITION FOR RELIEF FROM FINAL  
JUDGMENT AND ORDER

PURSUANT TO RULE 60(b) F.R.Civ.P.

The Petitioner, VINCENT PACELLI, moves this Court, pursuant to Rule 60(b) Federal Rules of Civil Procedure, Title 28, for relief from Final Judgment and Order denying the Petitioner's Motion to Vacate Sentence filed under 28 U.S.C. §2255, entered by the Honorable Judge Bonsal on September 8, 1976.

In support of this Petition the Petitioner does aver and says as follows:

(1) That the Petitioner filed a Motion to Vacate Sentence pursuant to 28 U.S.C. §2255 collaterally attacking his conviction and sentence in Criminal Indictment Number 64 CR. 828, and the Motion was docketed under Civil Action Number 75 Civ. 3624.

(2) That subsequent to the docketing, the United States Attorney was directed to show cause why the Motion to Vacate should not be granted, in compliance with the provisions of 28 U.S.C. §2255.

(3) That the Government through Robert B. Fiske, Jr. United States Attorney, by Ronald L. Garnett, Assistant U.S. Attorney, submitted an affidavit in Opposition to the Petitioner's Motion with accompanying Memorandum, and the Petitioner submitted an answer thereto.

(4) The Government submitted another "Affidavit in Response" undated except as to it being sworn to during July, 1976, with a Memorandum of Law in Support.

(5) On August 9, 1976, the Petitioner filed a "Reply to Government's Memorandum of Law" solely on the basis that the Government's response contained an erroneous statement as to the testimony of Government's witness Hedges, that, if accepted by the Court as factual, would be critical to the Court's Ruling on the Motion to Vacate.

(6) That there was no further filings by the Government; nor the Petitioner; nor had there been any notification by the Court

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that the sworn affidavits and Memoranda, filed by the Government, would not be considered in the Court's Ruling on the Motion to Vacate Sentence. Therefore, consistent with the "prompt hearing" provision of 28 U.S.C. §2255, the Petitioner on September 13, 1976, filed a Petition For Declaratory Relief and Summary Judgment (28 U.S.C. §2201/2202), seeking summary relief on Civil Action 75 Civ. 3624.

(7) That, although the Order denying the Motion to Vacate Sentence was signed by the Court on September 8, 1976, the "Date Stamp" on the Mailing Envelope shows that it was placed in the United States Mail in the P.M. of September 13, 1976, and received by the Petitioner on September 16, 1976; therefore, the Petitioner was unaware of the Order of Denial when he submitted the Petition for Relief noted in Paragraph 6, above.

(8) That the Court should exercise its broad discretionary authority in interpretation of pro se prisoner's Motions as noted in Holiday v. Johnston, 313 U.S. 342; Price v. Johnston, 334 U.S. 266, and consider the Petition for Declaratory Judgment and Summary Relief, as a Petition for a Re-Hearing since it states facts, not considered by the Court in its Order of Denial; and if considered by the Court would mandate an Evidentiary Hearing.

(9) That the present Petition is specifically cognizable under Rule 60(b)(3) F.R.Civ.P.: stating that the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

"(3) Fraud(whether heretofore denominated intrinsic or extrinsic), misrepresentation; or other misconduct of a adverse party"...

That the Petitioner states that the Government did perpetrate a fraud upon the Court in its "Sworn" response to the Court's Order to Show Cause by inferring that the Responses were based on the "Motion and the Files and the Records of the Case"; when, in fact, the critical areas in the Responses and Affidavits submitted by the Government can not be supported by the Records and the Files of the Case"; therefore, absent a statement by the Court, that the Government's filings were not considered by the Court in Denying the Motion, the Judgment complained of herein is null and void in that it was entered contrary to the Statute 28 U.S.C. §2255.

WHEREFORE, with cause shown above, and supported by the attached Memorandum of Law the Petitioner Prays the Court grant this Petition; Recind the Order of Dismissal entered September 8, 1976, in Civil Action 76 Civ. 3624, and grant the relief prayed for in the Motion to Vacate Sentence.

Respectfully submitted,

---

VINCENT PACELLI, Petitioner  
Box PMB, 89010-131  
Atlanta, Ga. 30315

STATE OF GEORGIA)  
                  :SS  
COUNTY OF FULTON)  
  
SWORN TO AND SUBSCRIBED BEFORE  
  
ME THIS        DAY OF SEPT.    ,1976

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Parole Officer

CERTIFICATE OF SERVICE BY MAIL

I, VINCENT PACELLI, certify that I have served a copy of the foregoing Petition and attached Memorandum of Law on RONALD L. GARNETT, Assistant U.S. Attorney, for the Southern District of New York, One St. Andrews Plaza, New York, N.Y. 10007, by mailing said copy by Certified Mail Return Receipt Requested this day of September, 1976.

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VINCENT PACELLI, Petitioner

**BEST COPY AVAILABLE**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NEW YORK, N.Y. 10007

VINCENT PACELLI,  
Petitioner  
  
-v-  
  
UNITED STATES OF AMERICA,  
Respondent.

75 CIV. 3624 (D.B.B.)  
RE: 64 Cr. 828

SUPPLEMENTAL MEMORANDUM IN SUPPORT  
OF PETITION  
FOR RECONSIDERATION

Petitioner respectfully submits that the Court's Memorandum dated September 8, 1976 evidences palpable misunderstanding of the issues in the case, the record facts, and the governing law, all doubtless due to the fact that the Government has grossly misled the Court in its "affidavits."

A. The law

1. Materiality

At the Government's suggestion, the Court was induced to apply the standard of United States v. Agurs, 96 S.Ct. 2392 (June 24, 1976) to this case (Court's Memorandum, p. 4). Yet even a cursory reading of that decision reveals its total irrelevance. Agurs involved the failure of a state prosecutor to volunteer that his witness had a criminal record. The Court was at pains to point out that such was a very different case than where there was a defense request for the suppressed evidence or there was perjury. In perjury cases

"... the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury" 96 S.Ct. at 2397.

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Moreover, where the prosecutor fails upon specific request to turn over relevant evidence, the test is virtually the same, whether the suppressed evidence "might have effected the outcome of the trial" Id. at 2398.

The test of materiality of information which was not requested and which does not tend to establish the knowing use of false testimony is very different, and that was all that was involved in Agurs. See Id. at 2397-99.

2. When a hearing is required

As was noted in Brown v. United States, 462 F.2d 681 (5th Cir. 1972), the "command of Title 28, U.S.C., Section 2255 is plain and equivocal:

"Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall...grant a prompt hearing thereon..."

The plain duty of the trial judge is to presume the truth of the allegations which are not conclusively refuted by the record, and to grant an evidentiary hearing where such allegations, if true, would entitle petitioner to relief. Powers v. United States, 446 F.2d 22 (5th Cir. 1971). It is simply wrong to require a petitioner to submit with his motion conclusive proof of his allegations. If this were so, there would never be a need for an evidentiary hearing.

A §2255 motion cannot be disposed of on the basis of countering affidavits, which are no part of the record in the case. Brown v. United States, supra; Montgomery v. United States, 469 F.2d 148 (5th Cir. 1971).

United States v. Romano, 516 F.2d 768 (2d Cir. 1975); and Williams v. United States, 481 F.2d 339 (2d Cir. 1973), cited by the Court (p. 4) are not otherwise. In Romano, petitioner claimed knowing use of perjured evidence based solely on a minor inconsistency in the witness' testimony

in two trials. In one, he said a narcotics delivery occurred in September. In petitioner's later trial, he said it was "close to the end of 1959, close to Christmas." In affirming the dismissal of a \$2255, the Court noted not only that the prior transcript was available for use in cross-examination at petitioner's trial, the inconsistency, if any, wholly failed to support the bald conclusion that the latter version was perjurious and known to be such by the Government. Romano stands for the proposition that a mere conclusion, unconnected in any way with facts, or even factual allegations, but consisting entirely of unwarranted inferences, does not require a hearing. Williams is totally irrelevant, since it deals with denial of a habeas corpus which had previously been denied after a full hearing. In the instant case, petitioner's allegations are factual, predicated upon the records and testimony in other proceedings, and he has never had or requested a hearing thereon. Neither the Court nor the Government has cited a case which suggests that the factual issues raised in the petition can be determined by accepting as true the claims of an Assistant United States Attorney, especially one who had no connection whatever with the trial.

B. The Issues

The Court's Memorandum deals only with three claims raised in the petition: (1) Withholding of the Hedges-Kahn tapes; (2) perjury by Hedges and Dugan regarding the Hedges-Kahn conversations; (3) suppression of evidence regarding Hedges relationship with the Government.

1. Other perjury

In addition to those, the petition alleged, upon supporting evidence, that Hedges perjured himself, with the Government's knowledge,

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when he swore that in return for his cooperation, "I was offered nothing, promised nothing, ...asked for nothing" (Tr. 1070), and "expected to get nothing" (Tr. 972). In truth and in fact, he was promised plenty (Pet. par. 25), got \$3000 (Quantl Tr. 918), got an apartment (Quantl Tr. 980), got out on bail at Dugan's doing (Pet. par. 14), got a sentence reduction, from 15 to 5 (Pet. par. 16). None of what hedges got (with the exception of help on bail) was disclosed to petitioner. What he got would plainly have proved his denials of any promises or expectations to have been perjurious.

The Court's failure to discuss these claims, virtually the crux of the petition, can only be explained by the fact that the Government in its Memorandum of Law cleverly conceals the fact that petitioner's allegations have never been denied, and cannot be. Petitioner, in his reply, pointed this out (p. 6). The Government then merely quibbled that it found no testimony that Hedges was "given nothing by the Government" as petitioner claimed (Memo. p. 7). What Hedges said was as follows:

"Q. So you expected to cooperate with the government and expect nothing in return for your cooperation? Am I right?

A. I want nothing. I ask nothing.

Q. I didn't ask you that. You expected to get nothing? Right?

A. That is correct, yes" (Tr. 971-72)

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"A. I repeat, Mr. Lewis, I was offered nothing, promised nothing, and I asked nothing." (Tr. 1070)

Thus, Hedges swore, by necessary implication, that he got nothing, and unequivocally that he was promised and expected nothing.

The Government thus mislead the Court by hinting that petitioner's claims about what Hedges got were false when in fact the Government knows they are true. Even worse, however, the Government makes the patently false claim that "Hedges did testify as to his expectation of future assistance from the Government, both when he began cooperating and at the time of trial" (Memo, p. 7).

Reliance upon the Government's erroneous innuendos and false assertions has led the Court into error. The transcript supports the petition.

2. The Kahn-Hedges tapes and the Hedges affidavit

With regard to the first claim considered by the Court--the failure to disclose to petitioner the Kahn-Hedges tapes and Hedges' affidavit, the Court states that petitioner's attorney was shown the tapes and did not choose "to use any of this material as it would have obviously been seriously damaging to their client's interest" (p. 3). In support of this, the Court cites pages of the transcript which were impounded (923-28), and which petitioner has never seen. Assuming arguendo, however, that the tapes were disclosed to petitioner's counsel under a strict admonition not to tell petitioner (See Govt. aff. p. 8; Petitioner's reply, p. 4), it hardly follows that counsel chose not to use the tapes, or that the choice was for the reason given by the Court. In any event, petitioner was entitled to see the tapes and to participate in the choice. Denying him such choice was a deprivation of the right to counsel. See Geders v. United States, 96 S.Ct. 1330 (Mar. 1976). The Court's conclusion that such evidence would have "obviously been seriously damaging" to petitioner is unwarranted. Such evidence would have given the lie to much of Hedges'

testimony, e.g. about being promised and expecting nothing, and would have shown that, contrary to his pose as a simple-minded, public-spirited citizen, he was a conniving, scheming, desperate, and guileful con man. One who would conspire and scheme against and lie to his lawyer would do the same to a jury. The evidence would surely have shown Hedges to be a consummate liar. Thus, whether on balance the evidence would have been harmful can never be known.

3. The sentence reduction

The Court wholly misunderstands petitioner's claims. That Judge Timbers "initiated" the sentence reduction (Court's Memo p. 3) does not contradict petitioner's claims-it is the foundation of such claims. Hedges swore he had no knowledge of any assistance in the sentence reduction, including the fact that the Government hadn't opposed the reduction. He denied any conversations with anyone about it (Tr. 1070-72, 1074). Agent Dugan heard this testimony and not only let it go uncorrected, he supported it by his own sworn denial that he had spoken with Hedges about it (Tr. 3333-34). As Judge Timber's account makes clear, however, Judge Timbers told Dugan to tell Hedges to make the motion, which Hedges did. Only if Dugan disregarded Judge Timber's instructions can the testimony of Hedges and Dugan be anything but perjurious (See pet., pars. 16-23; Petr's. Reply, p. 7-8). And plainly Dugan did as he was told, for the motion for reduction was filed, as Judge Timbers had suggested. Petitioner was convicted on the perjury of both Hedges and Dugan. Of that there can be no doubt.

4. Other issues

The Court says nothing about petitioner's allegations, supported

by the record, that the Government suppressed evidence that it took 6 months of "cooperation" by Hedges before petitioner's name appeared (pet. pars. 28-31); suppression of evidence of pending charges (par. 32); and known perjury about the source of money found on Hedges when he was arrested (par. 8). The truth of these allegations is established by the record, and their materiality is plain.

Conclusion

Petitioner's trial was peppered with perjury, all of it known to be such by Government agent Dugan. The record not only fails to contradict the petition, it supports it in every conceivable way. Petitioner is entitled to a hearing.

Respectfully submitted,

Dated: October 1, 1976

VINCENT PACELLI, Petitioner

COPY RECEIVED  
FEB 9 1977  
ROBERT B. FISKE JR.  
ATTORNEY  
S.D. DIST. OF N.Y.